San Francisco
Law Library

436 CITY HALL

EXTRACT FROM RULES

Rule 1a. Books and other legal material may be borrowed from the San Francisco Law Library for use within the City and County of San Francisco, for the periods of time and on the conditions hereinafter provided, by the judges of all courts situated within the City and County, by Municipal, State and Federal officers, and any member of the State Bar in good standing and practicing law in the City and County of San Francisco. Each book or other item so borrowed shall be returned within five days or such shorter period as the Librarian shall require for books of special character, including books constantly in use, or of unusual value. The Librarian may, in his discretion, grant such renewals and extensions of time for the return of books as he may deem proper under the particular circumstances and to the best interests of the Library and its patrons. Books shall not be borrowed or withdrawn from the Library by the general public or by law students except in unusual cases of extenuating circumstances and within the discretion of the Librarian.

Rule 2a. No book or other item shall be removed or withdrawn from the Library by anyone for any purpose without first giving written receipt in such form as shall be prescribed and furnished for the purpose, failure of which shall be ground for suspension or denial of the privilege of the Library.

Rule 5a. No book or other material in the Library shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured, and any person violating this provision shall be liable for a sum not exceeding treble the cost of replacement of the book or other material so treated and may be denied the further privilege of the Library.

N 2823

No. 13727

United States
Court of Appeals
For the Ninth Circuit.

CONSOLIDATED FLOWER SHIPMENTS, INC., BAY AREA,

Petitioner,

vs.

CIVIL AERONAUTICS BOARD and AIR-BORNE FLOWER AND FREIGHT TRAFFIC, INC,

Respondents.

Transcript of Record

Petition to Review an Order of the Civil Aeronautics Board.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—10-30-53

No. 13727

United States
Court of Appeals
For the Ninth Circuit.

CONSOLIDATED FLOWER SHIPMENTS, INC., BAY AREA,

Petitioner,

vs.

CIVIL AERONAUTICS BOARD and AIR-BORNE FLOWER AND FREIGHT TRAFFIC, INC,

Respondents.

Transcript of Record

Petition to Review an Order of the Civil Aeronautics Board.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—10-30-53

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

INDEX PAGE

INDEX PAGE

NAMES AND ADDRESSES OF ATTORNEYS

For Petitioner, Consolidated Flower Shipments, Inc.—Bay Area:

ANTONIO J. GAUDIO,

305 Linden Ave.,
South San Francisco.

For Respondent, Civil Aeronautics Board:

EMORY T. NUNNELEY, JR.,
General Counsel, Civil Aeronautics Board,
and
JAMES L. HIGHSAW, JR.,
Chief of Litigation and Research Division,
Civil Aeronautics Board,

Washington, D. C.

For Respondent, Airborne Flower and Freight Traffic, Inc.,:

PAUL T. WOLF,

155 Sansome St.,
San Francisco.

Orders
Serial Number E-5264.

United States of America
Civil Aeronautics Board
Washington, D. C.

Docket No. 4902

Adopted by the Civil Aeronautics Board at its Office in Washington, D. C., on the 9th day of April, 1951.

In the Matter of:

The Activities and Practices of CONSOLIDATED FLOWER SHIPMENTS, INC., BAY AREA

ORDER OF INVESTIGATION

It Appearing to the Board upon the basis of informal investigation, informal complaints, and other information available to the Board that:

(1) Consolidated Flower Shipments, Inc., Bay Area, is a corporation organized and existing under the laws of the State of California, located at Post Office Box 4, Redwood City, California;

(2) Since on or about June 14, 1949, Consolidated Flower Shipments, Inc., Bay Area, in the ordinary and usual course of its undertaking, performed or provided for the assembly and consolidation of flower shipments for transportation upon various direct air carriers, and performed or provided for break-bulk and distribution with respect to such shipments, and may have assumed respon-

sibility for the transportation of such shipments from the point of receipt to point of destination;

(3) Since on or about June 14, 1949, Consolidated Flower Shipments, Inc., Bay Area, may have been engaged and presently may be continuing to engage indirectly in the carriage by aircraft of property as a common carrier for compensation or hire in commerce between places in various states of the United States, particularly between San Francisco, California, on the one hand, and New York, New York; Philadelphia, Pennsylvania, and Chicago, Illinois, on the other;

(4) No certificate of public convenience and necessity or other form of economic operating authority to engage in air transportation has been issued by the Board to Consolidated Flower Shipments, Inc., Bay Area.

The Board, acting upon its own initiative, and pursuant to the authority vested in it by the Civil Aeronautics Act of 1938, as amended, particularly sections 205 (a), 401 (a), 1002 (b) and 1002 (c), thereof, and finding that its action is necessary in order to carry out the provisions of such Act and the requirements established pursuant thereto, particularly Part 296 of its Economic Regulations, and to exercise and perform its powers and duties thereunder; [1*]

It Is Ordered That:

1. An investigation be and it hereby is instituted into the operations of Consolidated Flower

*Page numbering appearing at top of page of original Certified Transcript of Record.

Shipments, Inc., Bay Area, to determine whether said Consolidated Flower Shipments, Inc., Bay Area, has engaged or is engaging indirectly in air transportation in violation of the provisions of the Act, particularly section 401 (a) thereof, or any requirement established pursuant thereto, particularly Part 296 of the Board's Economic Regulations, and if any such violation is established, whether the Board should issue an order directing Consolidated Flower Shipments, Inc., Bay Area, to cease and desist from such violation, or such other or further order or orders as may be necessary to compel compliance with the provisions of the Act and requirements thereunder established;

2. Consolidated Flower Shipments, Inc., Bay Area, be and it hereby is directed and required until otherwise ordered by the Board to preserve and refrain from destruction of any and all memoranda and documents pertaining either to its organization and operations, or the organization and operations of its predecessor company, since January 1, 1949, including all correspondence, shipping manifests, air bills, receipts, invoices, checks and check stubs, and all advertisements, brochures, notices, announcements, and other publicity material;

3. Consolidated Flower Shipments, Inc., Bay Area, be and it hereby is made a party to this proceeding;

4. This proceeding be assigned for a public hearing before an examiner of the Board at a time and place hereafter to be designated;

5. Consolidated Flower Shipments, Inc., Bay Area, be immediately notified by telegram of the entry of this order and thereafter duly served with a copy of such order.

By the Civil Aeronautics Board:

[Seal] /s/ M. C. MULLIGAN,
Secretary. [2]

United States of America
Civil Aeronautics Board
Washington, D. C.

Docket No. 4902, et al.

Consolidated Flower Shipments, Inc., Bay Area

NOTICE OF HEARING

In the Matter of the Investigation of the Activities and Practices of Consolidated Flower Shipments, Inc., Bay Area.

Notice is hereby given that pursuant to the Civil Aeronautics Act of 1938, as amended, particularly sections 205 (a), 401 (a), 1002 (b), and 1002 (c) of said Act, a public hearing is assigned to be held in the above-entitled proceeding on February 25, 1952, at 10:00 a.m. (Pacific standard time) in the Customs Court, 4th floor of the Appraisers Building, 630 Sansome Street, San Francisco, California, before Examiner Richard A. Walsh.

Without limiting the scope of the issues presented

by this proceeding, particular attention will be directed to the following matters and questions:

1. Has Respondent engaged or is it engaging indirectly in air transportation in violation of the provisions of the Act, particularly section 401 (a) thereof, and Part 296 of the Board's Economic Regulations?

2. If any such violation is established, whether the Board should issue an order directing Respondent to cease and desist from engaging in indirect air transportation within the meaning of the Act, or such other or further order or orders as may be necessary to compel compliance by Respondent with the provisions of the Act and the Board's Economic Regulations? [42]

For further details of the issues involved in this proceeding and the position of the parties, interested persons are referred to the Board's order to show cause, Serial No. E-5264, and other documents filed in this proceeding with the Docket Section of the Civil Aeronautics Board.

Notice is further given that any person, other than parties of record, desiring to be heard in this proceeding shall file with the Board on or before February 25, 1952, a statement setting forth the issues of fact or law raised by this proceeding which he desires to controvert.

Dated at Washington, D. C., February 7, 1952.

By the Civil Aeronautics Board:

[Seal] /s/ FRANCIS W. BROWN,
Chief Examiner. [43]

United States of America
Civil Aeronautics Board
Washington, D. C.

Docket No. 4902, et al.

In the Matter of:

CONSOLIDATED FLOWER SHIPMENTS, INC., BAY AREA; JOHN C. BARULICH, WILLIAM ZAPPETTINI

TRANSCRIPT OF ORAL PROCEEDINGS
February 25, 1952

The above-entitled matter came on for hearing, pursuant to notice, at 10:00 a.m.

Before: Richard A. Walsh, Examiner.

Appearances:

JOHN J. STOWELL,
Enforcement Attorney,

Washington, D. C.,

Appearing on Behalf of the Civil Aeronautics Board.

ANTONIO J. GAUDIO,

106 Bank Building,
South San Francisco, California,

Appearing on Behalf of Respondents.

PAUL T. WOLF, and
A. S. GLIKBARG,

155 Sansome Street,
San Francisco 4, California,

Appearing on Behalf of Airborne Flower and Freight Traffic, Inc. [51]

CLYDE E. REYNOLDS

was called as a witness for and on behalf of the Enforcement Attorney and, having been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Stowell:

Q. Would you give your full name and business name to the reporter, please?

A. Clyde E. Reynolds, Reynolds Brothers Transfer and Storage, Redwood City.

Q. What is the nature of your occupation, Mr. Reynolds?

A. At present it is household goods and storage moving.

Q. By that you mean trucking?

A. Trucking, general commodities.

Q. When did you enter upon this enterprise in the California area?

A. It was March 2, 1945.

Q. Were you ever employed by Slick Airways as a cargo agent? A. As an agent, yes.

Q. About when was that?

(Testimony of Clyde E. Reynolds.)

A. Approximately three years ago. It is not exact on that. [62*]

Q. Would February, 1949, be an approximate date? A. Approximately.

Q. When did you leave the service of Slick?

A. I have never left service for Slick as an agent. That is all, just an agent.

Q. I am interested in finding out a little bit about the history of Bay Area Flower Growers and Shippers. Would you think a moment, and tell me what you know about how that organization was organized at the very outset, how and why it was organized?

Mr. Gaudio: Just a moment. Mr. Examiner, I do not mean to impede counsel's inquiry in that respect, but in the absence of a further foundation I am not sure that what that might call for the witness' conclusion. It has no connection with respondent, Bay Area, as I understand it.

Examiner Walsh: We should have more foundation for that question.

Mr. Stowell: I will change the question.

Q. (By Mr. Stowell): Mr. Reynolds, when did you first hear of the organization, Bay Area Flower Growers and Shippers?

A. I do not have the exact date of it, but I was one of the instigators of starting it, and at the time I was interested in trucking only, and one of the——

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Clyde E. Reynolds.)

Q. Excuse me. I would like to ask you a further question. I think you have answered my [63] question. Did you ever hear of a person by the name of Mrs. Decia? A. I did.

Q. What connection did you have with her?

A. As a trucker, hauling flowers.

Q. Did you and Mrs. Decia ever write a letter to the airlines?

Examiner Walsh: Who is Mrs. Decia?

The Witness: Mrs. Decia was secretary of the Bay Area Flowers Consolidated. She is also a shipper, wholesale shipper.

Examiner Walsh: Is that the predecessor association to respondents, or is that a different association?

The Witness: It was——

Mr. Gaudio: I cannot hear the witness, and I believe the answer is that she is part of Bay Area. I am not sure that that is entirely correct.

The Witness: She was originally. I don't know now. She was the secretary at the time.

Examiner Walsh: The predecessor to this respondent. That is what I wanted to know.

The Witness: I don't understand the question.

Examiner Walsh: Will you lay a little more foundation for that, Mr. Stowell? I want to get the connection of Mrs. Decia with the respondent. [64]

Q. (By Mr. Stowell): Who is Mrs. Decia, to your knowledge? A. A flower shipper.

Q. Does she operate the California Floral Service? A. Yes.

(Testimony of Clyde E. Reynolds.)

Q. Did you and Mrs. Decia ever contact the Flower Growers and Shippers in this area and discuss with them the advisability of getting together in a shippers' association?

A. I believe it was Mr. Al Decia, through Virginia Decia.

Q. But the answer to my question is yes?

A. Yes.

Q. After this discussion did you talk to anyone else about the matter?

A. I talked to all the growers.

Q. Did you contact the air lines? A. Yes.

Q. Did you and Mr. Decia write a letter to the air lines? A. Yes.

Q. Mr. Reynolds, I show you a copy of a letter dated April 4, 1949. Would you examine this, please?

Did you and Mr. Decia write this letter?

A. I won't say that she and I wrote it, but it was during the talking, the information from different shippers and people that we talked to, that this is what we concluded.

Q. I see. Who wrote the letter, if you [65] know?

A. I wouldn't say for sure on that. I believe Mrs. Decia. I am not positive of that.

Q. Have you ever seen this letter before?

A. Yes, I have.

Q. Where?

A. I have it in my office, some of the original let-

(Testimony of Clyde E. Reynolds.)

ters that were sent out for the shippers to sign up on.

Q. Was this letter shown to you prior to being sent out? A. Yes.

Q. And to the best of your knowledge Mr. Decia sent this letter?

Mr. Gaudio: I submit that it is not in conformity with his prior testimony. He said he did not know who wrote it. He was familiar with it.

Examiner Walsh: Is that in the form of an objection?

Mr. Gaudio: I will object to the question as calling for the conclusion of the witness and also as leading.

Examiner Walsh: I will pass upon your objection after I hear one or two more questions.

Mr. Gaudio: Very well.

Q. (By Mr. Stowell): As far as you know, then, you have no further knowledge as to who actually mailed this letter?

A. No, I don't have.

Q. Can you tell us what happened after this letter was [66] sent?

First, I would like to ask one more question: Do you know to whom this letter was addressed?

A. Yes, it was addressed to all shippers that we were interested in getting into the Consolidation.

Q. How about the air lines?

A. Well, the air lines would have no——

Mr. Gaudio: Mr. Examiner, the witness has tes-

(Testimony of Clyde E. Reynolds.)

tified that he doesn't know when the letter was written, or rather by whom signed, and I submit if he doesn't know that he wouldn't know of his own knowledge if it was ever received by anyone. I think the question is leading, and also calls for a conclusion, and I object on that ground. There is no foundation laid that the witness knows anything about the course of this letter.

Q. (By Mr. Stowell): I want to ask the witness, do you know of your own personal knowledge to whom this letter was sent?

A. Yes, I do. In fact, I have taken them out and got a lot of them signed myself.

Examiner Walsh: You do know that they were sent out or taken around?

The Witness: That is right.

Examiner Walsh: I will overrule your objection as to that point, Mr. Gaudio. [67]

Q. (By Mr. Stowell): Of your personal knowledge, was this letter mailed to the air lines in this area? A. Not to my knowledge.

Q. Could you tell us what happened after you went around to the various shippers and got them to sign this letter?

Mr. Gaudio: What happened in what connection, counsel?

Mr. Stowell: I will rephrase the question.

Q. (By Mr. Stowell): What was the next chronological event after you went around and had this letter signed by various shippers? What hap-

(Testimony of Clyde E. Reynolds.)

pened, if you know, were there any meetings or further discussions between you and anyone?

A. Yes, there were several meetings held at California Floral in Redwood City, and at that time there were officers elected, and my understanding was that it was made a non-profit organization, incorporated. Mr. Zappettini was president, Mr. Bonacorsi was vice-president, I believe, and Virginia Decia was secretary, and Al Enoch was chairman of the board.

Q. Of your personal knowledge, do you know whether any of the air carriers' representatives held meetings of discussions with the flower growers concerning this group?

A. I believe that there were several of them there at different meetings. There were two, in fact, that I know of that were there at different meetings to find out if it could be worked. [68]

Q. Which air lines were they?

A. There was Slick, Flying Tigers, and American Airlines.

Q. How about United?

A. I believe that they were at the meeting also.

Q. Did this group engage you as a trucker to pick up flowers at the shippers' place of business and transport them to the airport?

A. They did.

Q. Where did you maintain your operations office?

A. Mills Field, South San Francisco; it was set

(Testimony of Clyde E. Reynolds.)

up at a later date. But originally it started out at Redwood City.

Q. Could you tell us about when the change was made? A. I don't have any records on that.

Q. Have you been out to the San Francisco airport recently? A. Yes, I have.

Q. Are you aware where the respondent, John Barulich, now maintains his office? A. Yes.

Q. Is that office the same premises which you occupied as your operations office as a trucker?

A. It is.

Q. Did you employ anyone to assist you, Mr. Reynolds?

A. Yes, Tal Lloyd. He did the assemblying. That is, he called the orders and made reservations on planes, and I went out and picked them up. [69]

Q. What was the title of his position?

A. I don't believe he had a title, other than just office help there, helping routing.

Q. How much did you pay him per week?

A. $80 per week.

Q. Could you describe for us the mechanics of your operation—and by that I mean discuss the mechanics, how did you know where to pick up boxes, where did you take them, what did you do with the boxes, what kind of papers were executed in connection with them?

Mr. Gaudio: Mr. Examiner, I will object to the question, unless it is fixed in point of time, as not relevant to the issues here involved. The witness

(Testimony of Clyde E. Reynolds.)

might answer by saying he hauled household goods between San Francisco and Los Angeles.

Mr. Stowell: I am sure the witness is quite aware, Mr. Examiner——

Mr. Gaudio: We are establishing a record here, and insofar as the answer to that question is concerned, at any rate I want it fixed as to point of time.

Examiner Walsh: I assume Mr. Stowell means at the beginning of the respondent organization, that is, the predecessor, Bay Area Flower Growers Association.

Is that what you have reference to?

Mr. Stowell: That is correct, Mr. Examiner.

Examiner Walsh: You have established that Mr. Reynolds [70] was connected with the organization at that time, I believe?

The Witness: That is right.

Examiner Walsh: Proceed from there, Mr. Stowell.

Mr. Stowell: Mr. Reporter, would you read back my question?

Examiner Walsh: Before you do that, are you planning to have that letter identified as an exhibit?

Mr. Stowell: Not at this time. I will reserve it for another witness.

(Question read.)

A. All the shippers were called each morning to find out what orders they had to go out, and after we got the total amount we called all the different

(Testimony of Clyde E. Reynolds.)

air lines and routed them out. And of an evening, when we got all the calls made, we would assign them to these designated air carriers, which in turn would haul them to the designated points.

Q. (By Mr. Stowell): At the very outset, who executed the air bills and other papers?

A. We did ourselves.

Q. And by "we" who do you mean?

A. Tal Lloyd and myself.

Q. What financial arrangement did you have with the shippers' group?

A. Merely trucking. I have a letter to the effect that [71] Mr. Zappettini——

Mr. Gaudio: Just a moment. I object to reference being made to a letter that is not in evidence.

Mr. Stowell: At this time will you just answer my question.

Examiner Walsh: Strike that portion referring to the letter.

Q. (By Mr. Stowell): I am going to repeat my question. What financial arrangement did you have with the shippers' group? How much were you paid, and for what?

A. I was paid 50 cents per box.

Q. And what did that cover?

A. That included picking up and hauling to the airport, and assembling for shipment. Or 25 cents a box if some of the shippers hauled them to the airport themselves and dumped them off at the depot.

(Testimony of Clyde E. Reynolds.)

Q. Now, did the 50 cents cover the physical consolidation—and by "consolidation" I mean assembly and segregation of the boxes according to destination? A. It did.

Q. Did it also cover the paper consolidation—and by that I mean the execution of an air bill covering a consolidated shipment with the individual manifest attached thereto? [72]

A. It covered a master bill, yes.

Mr. Stowell: Would you read that question back to him, please?

(Question read.)

A. It did.

Q. How did you receive this money, in what mechanical manner?

A. There were advance charges added to the air bill, and in return the air line would pay me.

Examiner Walsh: What do you mean by "advance charges"?

Mr. Stowell: Mr. Examiner, I propose to offer some documents rather shortly which will illustrate.

Examiner Walsh: I am trying to catch the physical significance.

Q. (By Mr. Stowell): What do you mean by an advance charge?

A. Well, you have the weight and whatever the expense is on hauling the flowers, plus you have an advance charge for your hauling that is added right into the total amount. And the air lines when they

(Testimony of Clyde E. Reynolds.)

collect the total amount they send you back your advance charge.

Examiner Walsh: I see. You do not receive any money until after the flowers are delivered to the consignee and the air carrier remits to you; is that correct?

The Witness: That is right. [73]

Q. (By Mr. Stowell): Did you pay a California transportation tax on the advance charges?

A. I did.

Q. At what per cent? A. Three per cent.

Q. And such tax covered the entire amount of the advance charge, namely, at the rate of 50 cents when you picked it up or 25 cents if the boxes were deposited at the airport; is that correct?

A. That is right.

Q. And the advance charge on the air bill, how did that read, or in whose name was that indicated?

A. Bay Area, just Bay Area.

Mr. Stowell: Mr. Examiner, I would like to refresh the witness' recollection on that.

Q. (By Mr. Stowell): Mr. Reynolds, I show you a copy of an air bill.

Mr. Gaudio: You are not going to impeach his testimony?

Mr. Stowell: No, just correct his testimony.

Q. (By Mr. Stowell): Would you examine this air bill, please. Are you willing to make a correction in your testimony?

A. I am, for the simple reason that before Mr. Barulich came into it I signed Reynolds Brothers,

(Testimony of Clyde E. Reynolds.)

but after he came in [74] it was signed Bay Area thereafter.

Mr. Gaudio: Just a moment. I will ask that the last go out as calling for the conclusion of the witness as to what Mr. Barulich did.

Examiner Walsh: Strike that portion of the answer, leaving the first portion, that he made it out in the name of Reynolds Brothers, and proceed with the questioning, Mr. Stowell.

Q. (By Mr. Stowell): At this time I am primarily interested in the period prior to such time Mr. Barulich entered the picture.

A. That is right, then it was Reynolds Brothers.

Mr. Stowell: Mr. Examiner, at this time I move that this particular document be marked for identification as EA-1.

Examiner Walsh: It will be marked for identification as Enforcement Attorney's Exhibit No. 1.

(The document referred to was marked for identification as Enforcement Attorney's Exhibit No. 1.)

Examiner Walsh: Mr. Stowell, what was the date on that?

Mr. Stowell: It is dated February 8, 1950.

Q. (By Mr. Stowell): Mr. Reynolds, I am going to show you a number of documents, and I would like to have you examine these.

Examiner Walsh: Do you have a number of them? [75]

Mr. Stowell: I have no copies, so I would ap-

(Testimony of Clyde E. Reynolds.)

preciate it if you would come and look at them, Mr. Gaudio.

Q. (By Mr. Stowell): Mr. Reynolds, I now ask you, were these air bills and documents executed by you or by personnel under your supervision and direction? A. They were.

Examiner Walsh: Will you identify them?

Mr. Stowell: Mr. Examiner, I now move that these documents be marked for identification.

Examiner Walsh: Call them off by title and date.

Mr. Stowell: EA 2, Air bill, July 5, 1949, consigned to the Suburban Delivery Service.

Mr. Wolf: Who was the consignor, Mr. Examiner?

Mr. Stowell: It indicates Bay Area as consignor.

EA 3, air bill, consignor Suburban Delivery Service, to S. S. Pennock, dated July 7, 1949.

EA 4 is a flower manifest attached to EA 2.

Examiner Walsh: What is the date on that?

Mr. Stowell: They are all the same date.

EA 5 is another flower manifest, same date, attached to the same air bill.

Examiner Walsh: The foregoing documents will be marked for identification as Enforcement Attorney's Exhibits 2, 3, 4 and 5. [76]

(The documents referred to were marked for identification as Enforcement Attorney's Exhibits Nos. 2 through 5, inclusive.)

(Testimony of Clyde E. Reynolds.)

Mr. Stowell: EA-6, from Bay Area to Suburban Delivery Service, dated June 24, 1949.

EA-7, from SDS—which I presume is Suburban Delivery Service—to Shock Wholesale Florist, dated June 25, 1949.

EA-8, from Suburban Delivery Service to Charles Simon, Jr., & Son, dated June 26, 1949.

EA-9, is a flower manifest, dated June 24, 1949, and attached to the foregoing documents, namely, EA-6.

EA-10, flower manifest dated June 24, 1949, and similarly attached.

EA-11, flower manifest dated June 24, 1949, and attached to the others mentioned.

Examiner Walsh: Does that complete that group?

Mr. Stowell: I have a few more in another group here.

EA-12, dated August 1, 1949, with the following documents attached thereto, which will be given EA numbers:

EA-13, dated August 2, 1949, from Suburban Delivery Service to Louis B. Glick Company.

EA-14, from Suburban Delivery Service to Charles Simon & Sons, August 2, 1949.

EA-15, from Suburban Delivery Service to C. C. Sieck, dated August 2, 1949. [77]

EA-16, dated August 2, 1949, from Suburban Delivery Service to D. R. Smith, Wholesale Florist.

(Testimony of Clyde E. Reynolds.)

EA-17, from Suburban Delivery Service to Markie Florist, dated August 2, 1949.

EA-18, from Western Wholesale Florist to Tidewater Wholesale Florist, dated August 3, 1949.

EA-19, flower manifest, August 1, 1949.

EA-20, flower manifest, August 1, 1949.

EA-21, flower manifest, August 1, 1949.

EA-22, another flower manifest, August 1, 1949.

EA-23, flower manifest, August 1, 1949.

EA-24, another flower manifest, August 1, 1949.

Examiner Walsh: The foregoing documents identified as Enforcement Attorney's Exhibits 6 through 24, respectively.

(The documents referred to were marked for identification as Enforcement Attorney's Exhibits Nos. 6 through 24, inclusive.)

Mr. Stowell: EA-25 is a pool flower shipment delivery notice, dated July 6, 1949.

EA-26 is a receipt from Paul's Wholesale, received from Suburban Delivery Service, dated July 8, 1947. It is probably 1949.

EA-27, flower manifest, dated July 6, 1949.

EA-28 is an air bill from Bay Area Flower Shippers & Growers, Inc., to Suburban Delivery Service, dated August 4, 1949. [78]

EA-29, an air bill from Bay Area to Suburban Delivery Service, dated August 4, 1949.

EA-30, from Bay Area to City Delivery Service,

(Testimony of Clyde E. Reynolds.)

dated August 3, 1949, with the following attached documents:

EA-31, dated August 3, 1949.

EA-32, Bay Area to City Delivery Service, August 3, 1949.

EA-33, Bay Area to City Delivery Service, August 3, 1949.

EA-34, flower manifest, dated August 3, 1949.

EA-35, flower manifest, dated August 3, 1949.

EA-36, flower manifest, dated August 3, 1949.

EA-37, air bill, City Delivery Service to Greenwood Floral, dated August 4, 1949.

EA-38, air bill, City Delivery Service to Lige Green Floral Company, dated August 4, 1949.

EA-39, manifest, dated August 3, 1949.

EA-40, flower manifest, August 3, 1949.

EA-41, flower manifest—cargo manifest, designated from San Francisco to DAL No. 5907.

EA-42 is an American Airlines invoice to City Delivery Service.

EA-43 is an air bill dated July 26, 1949, and has attached thereto the following documents:

EA-44, flower manifest. [79]

EA-45, flower manifest, dated July 26, 1949.

EA-46, flower manifest, dated July 26, 1949.

EA-47, flower manifest, dated July 26, 1949.

EA-48, flower manifest, dated July 26, 1949.

EA-49, flower manifest, dated July 26, 1949.

(Testimony of Clyde E. Reynolds.)

EA-50, air bill, dated July 26, 1949.

EA-51, air bill, dated July 26, 1949.

EA-52, air bill, dated July 26, 1949.

EA-53, air bill, dated July 26, 1949.

EA-54, air bill, dated July 26, 1949.

EA-55, air bill, dated July 26, 1949.

EA-56, air bill, dated July 26, 1949.

EA-57, air bill, dated July 26, 1949.

EA-58, air bill, dated July 26, 1949.

EA-59, air bill, dated July 26, 1949.

EA-60, air bill, dated July 26, 1949.

EA-61, air bill, dated July 26, 1949.

EA-62, air bill, dated July 26, 1949.

EA-63, air bill, July 26, 1949.

EA-64, air bill, July 26, 1949.

EA-65, air bill, July 26, 1949.

EA-66, air bill, dated March 2, 1950.

EA-67 is an air bill bill of lading, dated March 2, 1950.

EA-68 is an air bill of lading, dated June 10, 1950.

EA-69 is an air bill, dated July 26, 1950. [80]

And EA-70 is an air bill, dated June 10, 1950.

Examiner Walsh: Is that all you have?

Mr. Stowell: That is right.

Examiner Walsh: The foregoing documents are identified as Enforcement Attorney's Exhibits Nos. 25 through 70, respectively.

(Testimony of Clyde E. Reynolds.)

(The documents referred to were marked for identification as Enforcement Attorney's Exhibits Nos. 25 through 70, inclusive.)

Q. (By Mr. Stowell): To whose bank account did you deposit the proceeds from the advance charges which were talked about a few minutes ago?

A. Reynolds Brothers.

Q. Did you sign the air bill as agent of the Association? A. I did.

Examiner Walsh: Your own name as agent for the Association?

Mr. Stowell: I didn't ask him that. Did you want to ask him that?

Examiner Walsh: I am trying to get it straightened out as to how he did sign them.

Q. (By Mr. Stowell): The funds which were the proceeds from the advance [81] charges you just testified that they were deposited in your own name. By your own name do you mean that the funds were exclusively for your own use and had no other beneficial owner but yourself?

A. Yes, Reynolds Brothers Transfer.

Q. But the funds were not held in trust for the beneficial use of anyone else but your own company, called Reynolds Brothers Transfer; is that correct?

A. That is right.

Q. Mr. Reynolds, I show you a copy of a letter, dated June 15, 1949, signed by Bay Area Flower Shippers & Growers, Inc., signed "William Zap-

(Testimony of Clyde E. Reynolds.)

pettini to Clyde E. Reynolds." Would you examine this, please.

Did you receive such a letter? A. I did.

Mr. Stowell: Mr. Examiner, I move that this be marked for identification as EA-71.

Examiner Walsh: The document will be marked for identification as Enforcement Attorney's Exhibit 71.

(The document referred to was marked for identification as Enforcement Attorney's Exhibit No. 71.)

Q. (By Mr. Stowell): Can you recall for how long this arrangement continued where you received the 50 cents per box under certain [82] circumstances, and the 25 cents under other circumstances, as you previously testified?

A. I do not have it correct, the beginning and the ending.

Q. Does the date September 23, 1949, mean anything to you in relation to the arrangements which you had with the Association?

A. Is that discontinuing——

Q. You are answering.

A. I don't have the exact beginning of it, or the ending, although it is on file at the office.

Q. From whose funds did you pay Lloyd's salary?

Mr. Gaudio: Who is Lloyd?

Mr. Stowell: He was previously identified as an employee of Reynolds.

(Testimony of Clyde E. Reynolds.)

A. From my own funds.

Q. (By Mr. Stowell): From the funds which you previously described as the Reynolds Brothers Transfer & Storage? A. That is right.

Q. Who owned the office equipment at your operations office at the airport?

Mr. Gaudio: I don't think there has been any operations offce Reynolds established at the airport.

Mr. Stowell: There has been, Mr. Examiner.

Examiner Walsh: I believe the testimony was that the [83] premises which Mr. Reynolds occupied at the airport previously are the same as have been occupied by respondent.

A. I believe a desk and a chair belonged to the building that we leased.

Q. (By Mr. Stowell): And can you recall what equipment you owned?

A. A typewriter and adding machine, and two chairs, I believe, and a filing cabinet.

Q. From whose funds did you pay the rent?

A. From Reynolds Brothers Transfer.

Q. How much rent did you pay?

A. Fifty dollars per month.

Q. To whom?

A. A gentleman by the name of Mason. I don't have his correct address.

Q. Does the name Aviation Activities, Inc., mean anything to you in that connection?

A. That is the one.

Q. Was there any kind of a lease arrangement between you and Aviation Activities, Inc.?

(Testimony of Clyde E. Reynolds.)

A. Just monthly only, just rental.

Q. Did you receive a receipt from Aviation Activities, Inc., for payment of the rent?

A. We did.

Q. Do you recall how that receipt was made out? [84] A. No, I don't.

Q. In whose name was the tenancy held at the airport?

Mr. Gaudio: I submit that calls for a conclusion.

Mr. Stowell: I will rephrase the question.

Q. (By Mr. Stowell): In your understanding with Mr. Mason was anything ever said about who the tenant was at that office?

Mr. Gaudio: Just a moment. I will object to the question as leading and calling for the conclusion of the witness, and also hearsay, without a foundation being laid.

Examiner Walsh: Let us find out first what arrangements were made, if any.

Mr. Gaudio: By whom, where, and under what circumstances.

Q. (By Mr. Stowell): Prior to your moving into this operations office at airport did you contact the Aviation Activities, Inc., people?

A. I did.

Q. To whom did you speak?

A. The mechanic there, working on some sparkplugs, is all I know, and he referred me to Mr. Mason, who was in charge of the incorporation, and through him I rented the building.

(Testimony of Clyde E. Reynolds.)

Q. What did you tell Mr. Mason?

A. Just that I wanted to rent——

Mr. Gaudio: Just a moment, Mr. Reynolds. [85] I am sort of anticipating what counsel has in mind, I believe, but I submit that unless a foundation is laid as to what his purpose was in going to Mr. Mason it would be irrelevant as to this particular respondent, and certainly as to Mr. Barulich.

Mr. Stowell: Mr. Examiner, these are preliminary questions which are designed to show the tie-up between the renting of the building by Bay Area and the continuity of behavior later on carried on by these respondents. This is historical material which has a direct line of bearing or connection with the present behavior of the respondents.

Examiner Walsh: Let Mr. Reynolds testify as to what conversations he had with respect to the rental or the leasing of this building, and whoever he talked to, and give us some of the gist of the conversation, the details of the arrangements.

Q. (By Mr. Stowell): What was the conversation between you and Mr. Mason about this building?

Mr. Gaudio: Just a moment. I assume that Mr. Reynolds, unless my objection is overruled, in going to Mr. Mason would say that he was going there in some capacity on behalf of Consolidated Flower Growers and Shippers Association.

Mr. Stowell: Not necessarily.

Mr. Gaudio: Then without a foundation to that

(Testimony of Clyde E. Reynolds.)

effect [86] I object to the question as calling for hearsay testimony as to Mr. Barulich, and not relevant to the issues as to Bay Area, who is respondent in this proceeding.

Mr. Stowell: This witness testified that he had an operations office at the airport wherein he conducted his trucking business, which was so conducted in connection with Bay Area. Therefore, there is a very definite connection between showing the conversations as to how he secured the lease or tenancy for this office at the airport, and since the witness has already given this testimony as a foundation, I am merely trying to show the nature of the arrangements.

Examiner Walsh: I will allow the witness to testify in his own words as to what the conversations were, and he may recite the details.

The Witness: The shippers felt that they needed an office, somebody at the airport at all times, so when they called, somebody there could make arrangements with the air lines. As an extra service they figured somebody was needed at the airport at all times.

So I went to Mr. Mason and acquired this building for an office.

And we hired a man, Tal Lloyd, to handle the operations, and we paid $50 a month rent for the building, which came out of Reynolds Brothers' funds.

Q. (By Mr. Stowell): What [87] did you tell Mr. Mason when you sought to rent this office?

A. That we needed an office.

(Testimony of Clyde E. Reynolds.)

Q. When you say "we," to whom are you referring?

A. Bay Area needed the office. As an agent for Bay Area I said we needed an office for this operation.

Q. Did you use those words to Mr. Mason, that you as an agent for Bay Area——

A. I don't recall the exact words I used, but——

Mr. Gaudio: I submit he has already testified, Mr. Examiner, that as an agent for Bay Area and the shippers he approached Mr. Mason.

Now I think counsel is trying to have the witness recant his testimony and perhaps cast a reflection on it that might not be acceptable to Mr. Stowell. But I would like the witness' testimony to stand as given, unless he himself wants to explain it.

Examiner Walsh: Proceed.

Q. (By Mr. Stowell): How did you pay Mr. Mason? A. By check.

Q. Who signed the check?

A. I signed the check—I or my brother.

Q. Was there anything on the check, any kind of entry or notation of any kind, that indicated that it was a check [88] other than one issued by you for payment of rent for those premises?

Mr. Gaudio: Just a moment. I submit we should have the check if we are going to indulge in what the check showed, Mr. Examiner, if it is available. I assume it might be.

Mr. Stowell: Do you have those checks?

(Testimony of Clyde E. Reynolds.)

The Witness: We do have. All records are kept for four years. He should know that. And we would have them on file.

Examiner Walsh: Would you submit the cancelled checks for the record?

The Witness: I could.

Q. (By Mr. Stowell): Do you have any correspondence which was addressed to you by Mr. Mason or the Aviation Activities Company in connection with these premises?

A. Nothing other than cancelled checks, to my knowledge.

Q. What forms were used in the conduct of your operations for Bay Area?

A. You mean the manifests that were thought up later? We have them on file. Before they were just ordinary——

Q. Who supplied the forms, the manifests and things which you used?

A. In the beginning the air lines, but later on Bay Area [89] got manifests of their own which were made up under the heading of Bay Area Flower Shippers Association.

Q. I show you a form which reads "Flower Manifests," and ask you if this is the form which was supplied by Bay Area.

A. I believe it is. Yes, it is.

Q. Did you have anything to do with drawing up this form?

A. I might have had a suggestion, but I don't

(Testimony of Clyde E. Reynolds.)

know. I think the board decided on what manifests they would have.

Q. Can you recall what suggestion you may have made about this form?

A. No, other than just so many copies. I believe that is all that I might have suggested.

Mr. Stowell: Mr. Examiner, I move that this form be marked for identification as EA-72.

Examiner Walsh: The copy of the form is marked for identification as Enforcement Attorney's Exhibit 72.

(The document referred to was marked for identification as Enforcement Attorney's Exhibit No. 72.)

Q. (By Mr. Stowell): Can you tell me who executed this flower manifest which I just showed you?

Mr. Gaudio: Just the form itself? [90]

Mr. Stowell: I am interested in getting at a description of the procedure of how he operated.

A. No, I think the Board of Directors decided on what manifests were to be used, and it was drawn up through the shippers themselves.

Q. (By Mr. Stowell): Mr. Reynolds, I had in mind when a shipper had a shipment that he picked up, when did the flower manifest first arrive in the procedure?

A. The shipper filled it out himself, then the trucker came, and he picked up the manifest with the box of flowers, and took it to the airport.

(Testimony of Clyde E. Reynolds.)

Q. What type of information would the manifest show?

A. Consignor and consignee, and the weight.

Q. Did you use these manifests as a basis for calculating a pro-ration of the airfreight and other charges? A. Yes.

Q. Did you receive any compensation from the Association?

A. Nothing other than hauling, what I got paid per box, that is the only compensation I got.

Q. Did you receive that per box hauling fee which you referred to from the Association, or from whom did you actually receive the physical receipt of that money? [91]

A. The air lines. Actually it was from the consignee, I believe paid for it, but the air lines in return gave it to me. That was an advance charge added to the flowers, which was collected from the consignee and returned through the air line to me.

Examiner Walsh: Was it by check, Mr. Reynolds?

The Witness: Yes.

Examiner Walsh: And in whose name was that check made out?

The Witness: Reynolds Brothers.

Q. (By Mr. Stowell): Were you personally acquainted with the business of the members of the Bay Area group? A. Yes.

Q. Would you describe that business, please.

A. Wholesale flower shippers.

(Testimony of Clyde E. Reynolds.)

Q. Were there any flower growers, wholesalers?

A. Yes.

Q. Were these flower growers competitors?

Mr. Gaudio: Just a moment.

Mr. Stowell: If you know.

Mr. Gaudio: I will object to the question as irrelevant, incompetent and immaterial.

Mr. Stowell: I will rephrase the question.

Examiner Walsh: Do you withdraw it? [92]

Mr. Stowell: I will withdraw it.

Q. (By Mr. Stowell): From your knowledge of the air bills and the delivery manifests, did you ever observe that a number of the members of the Bay Area group shipped to the same consignee?

Mr. Gaudio: If you remember, Mr. Reynolds.

I don't know the purpose of this.

Examiner Walsh: That is all he can do, is to testify as to his recollection.

Mr. Stowell: The purpose was to show that these flower growers were competitors.

Mr. Gaudio: I submit that that question is not involved before the Board, Mr. Examiner, as to whether they are competitive or not.

Mr. Stowell: Mr. Examiner, I believe the status of Bay Area as a bona fide association requires information about the type of business the members do, whether the Association has an economic interest in the goods shipped, whether they are competitors, whether it is a true association where the members cooperate, or whether basically there are conflicting interests between the members of the Association

(Testimony of Clyde E. Reynolds.)

such as competition and other inconsistent interests of the members to each other.

And if the Examiner does not allow me to ask him [93] directly as to whether he personally knew whether these other flower growers were competitors, I have no alternative but to phrase the questions indirectly, and find out whether these growers shipped to the same consignees.

Examiner Walsh: I believe the record would be illuminated somewhat if we had some information on that. I will allow the witness to answer.

A. Yes, they were.

Examiner Walsh: Try to give us some sort of a detailed statement with respect to that.

The Witness: Take a large wholesaler in the East, he buys from several shippers, regardless of whether they are competitive or not. They all ship to this one wholesaler, and in turn he resales them out.

Q. (By Mr. Stowell): Do you have any knowledge as to the management of the corporate funds of Bay Area at the time when you were trucking?

A. No, I don't.

Q. Do you know who, for example, paid for the manifests?

A. The shippers paid for them, but they were prorated out as they got them. As the shippers got them they paid the consolidation so much per box or per manifest.

Q. Have you already testified as to who the

(Testimony of Clyde E. Reynolds.)

Board of Directors of Bay Area were [94] when—— A. I believe I have.

Q. Can you tell us when Mr. Barulich entered the picture?

A. I do not have the exact date.

Q. September, 1949, is that an approximate date?

A. I do not have that information.

Examiner Walsh: I wonder if that couldn't be stipulated, the date on which Mr. Barulich entered the organization.

Mr. Gaudio: Yes. I assume that Mr. Barulich will develop that in full when he takes the stand.

Mr. Stowell: Could you give us that date now?

Mr. Gaudio: There are some records that will establish it.

Mr. Stowell: At this point, I want to get the continuity of what happened.

Mr. Gaudio: Do you have the copy of the minutes of the meeting of the Board of Directors first mentioning Mr. Barulich replacing Mr. Reynolds, when he was first introduced in the organization?

Mr. Stowell: I don't know.

Let's assume a certain date, subject to correction. Let's assume September, 1949.

Does that sound all right?

Mr. Gaudio: Subject to correction. That is approximately correct, yes. [95]

Mr. Stowell: Subject to correction, yes.

Q. (By Mr. Stowell): Of your knowledge, did

(Testimony of Clyde E. Reynolds.)

Mr. Barulich come into fill an existing vacancy?

A. Yes.

Q. Whose vacancy?

A. Traffic Manager. We at that time had no traffic manager other than myself and Tal Lloyd, and the Association felt that they needed a traffic manager to perform the duties, and I assumed at the time it was to take Tal Lloyd's place, but later I found out it was not.

Q. At the time when Mr. Lloyd left Mr. Barulich was hired?

A. No, that is wrong. Mr. Barulich came in, and my understanding was that he was to be a traffic manager.

Mr. Gaudio: Just a moment. If it relates to an understanding between Mr. Barulich and the Association, I submit it calls for a conclusion of the witness, without a foundation.

Examiner Walsh: Just state what your knowledge of it is.

Mr. Stowell: Just give us your personal knowledge.

The Witness: That is my understanding. Mr. Lloyd was kept on, and they were both paid. I was assessed ten cents a box for Mr. Barulich being on, which was agreeable to [96] me at the time, but later on I went back to the Association and felt that he was doing me no good, as far as the money coming out of my pocket, and I wanted them to reimburse him, and they would not.

Q. (By Mr. Stowell): Can you recall about

(Testimony of Clyde E. Reynolds.)

what period of time there were three people involved in this setup—that is, yourself, Mr. Barulich and Mr. Lloyd?

A. From the time Mr. Barulich came in, until we cancelled out the contract, there were three employees there.

Q. During such period, at least at the beginning of the time when these three people were there, you continued to pay Mr. Lloyd's $80 a week out of your own funds, is that correct?

A. That is right.

Q. Did you pay Mr. Barulich anything?

A. Yes, I paid him the prorate fee per box.

Q. How much per box?

A. Ten cents per box for what I picked up, and what was delivered to the fields he got five cents per box.

Q. From whose funds were such payments made to Mr. Barulich?

A. From my funds, Reynolds Brothers.

Mr. Stowell: In order to refresh your recollection, Mr. Reynolds, I am going to show you a tabulation which has [97] been prepared from records which you made available to the Enforcement Attorney, and ask you to state whether it is an accurate record of payments made to Mr. Barulich from your check stubs and check books.

Examiner Walsh: Let's take about a five-minute recess at this time.

(Short recess.)

Examiner Walsh: Come to order, gentlemen.

During the recess the Enforcement Attorney requested that the testimony of Mr. Reynolds be interrupted at this time so that he might call Mr. Lee to give his testimony.

(Witness temporarily excused.)

Examiner Walsh: Mr. Lee is now on the stand. Whereupon,

WILLIAM R. LEE

was called as a witness for and on behalf of the Enforcement Attorney, and having been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Stowell:

Q. Would you give the reporter your full name, please. A. William R. Lee.

Q. What is your occupation, Mr. Lee?

A. Wholesale Florist. [98]

Q. Mr. Lee, did you bring with you certain records which were subpoenaed?

A. Yes, I did.

Q. May I have them, please?

Mr. Lee, I will ask you when you first heard the name of Bay Area Flower Growers & Shippers, Inc.?

A. I don't recall the exact year, but I think it was possibly about three or four years ago.

Q. Is it correct, Mr. Lee, that you were sub-

(Testimony of William R. Lee.)

poenaed to bring with you flower manifests for shipments made by Consolidated Flower Growers and Shippers, Inc.? A. That is correct.

Q. Would you indicate, after I conclude reading from these manifests, whether the information is exactly as is indicated thereon.

February 25, 1950, shipper Lee Brothers, consignee Linwood Wholesale Florist, Detroit, Air Bill No. FT-39858.

Flower manifest, March 4, 1950, shipper Lee Brothers, consignee Linwood Wholesale Florist. This particular manifest has a mark at the bottom, Reynolds $1.03, and there were two boxes shipped.

March 7, 1950, flower manifest, has a notation RB $1.03, two boxes, to Linwood Wholesale.

March 9, 1950, manifest, notation RB $1.03, shipper Lee Brothers, consignee Linwood Wholesale, Detroit. [99]

March 11, 1950, flower manifest, shipper Lee Brothers, consignee Linwood Wholesale Florist, two boxes, with the notation RB $1.03.

March 21, 1950, shipper Lee Brothers, consignee Linwood Wholesale, one box, Reynolds notation 52 cents.

Flower manifest, April 17, 1950, shipper Lee Brothers, consignee Linwood Wholesale, Reynolds Brothers $1.03.

Manifest, April 19, 1950, shipper Lee Brothers, Reynolds Brothers notation $1.03, two boxes, to Linwood Wholesale Florist, Detroit.

(Testimony of William R. Lee.)

Flower manifest, April 22, 1950, shipper Lee Brothers, consignee Linwood Wholesale, one box, notation RB 52 cents.

Flower manifest, dated April 22, 1950, total boxes one, notation RB 52 cents, consignee Linwood Wholesale Florist.

April 24, 1950, shipper Lee Brothers, consignee Linwood Wholesale, Reynolds Brothers notation $1.03.

Flower manifest, April 26, 1950, shipper Lee Brothers, consignee Linwood Wholesale, two boxes, notation RB $1.03.

April 27, 1950, shipper Lee Brothers, consignee Linwood Wholesale Florist, two boxes $1.03.

Manifest, May 1, 1950, shipper Lee Brothers, consignee Linwood Wholesale, two boxes.

May 2, 1950, manifest, shipper Lee Brothers, consignee Linwood Wholesale, two boxes. [100]

Manifest, May 5, 1950, Lee Brothers, shipper, Bay Area what was the occasion? Did someone reboxes, RB $1.03.

Manifest, May 8, 1950, shipper Lee Brothers, consignee Linwood Wholesale Florist, notation at the bottom RB $1.03, two boxes.

Tuesday, May 9, 1950, shipper Lee Brothers, consignee Linwood Wholesale Florist, one box, Reynolds 52 cents.

May 11, 1950, manifest, shipper Lee Brothers, consignee Linwood Wholesale, one box, notation RB 52 cents.

(Testimony of William R. Lee.)

Shipper Lee Brothers, flower manifest, dated May 16, 1950, consignee Linwood Wholesale, total boxes two, notation RB $1.03.

Flower manifest, Monday, May 15, 1950, consignee Linwood Wholesale, two boxes, with notation RB $1.03.

Shipper Lee Brothers, on manifest dated May 18, 1950, to Linwood Wholesale, two boxes, RB $1.03.

Manifest, dated May 23, 1950, shipper Lee Brothers, one box and two hampers, consignee Linwood Wholesale.

Manifest, dated May 22, 1950, shipper Lee Brothers, consignee Linwood Wholesale, two boxes, notation RB $1.03.

Manifest dated May 25, 1950, shipper Lee Brothers, consigneé Linwood Wholesale, notation RB 52 cents.

Manifest, dated May 27, 1950, shipper Lee Brothers, consignee Linwood Wholesale, five boxes, with notation RB $2.58. [101]

Flower manifest, May 29, 1950, shipper Lee Brothers, consignee Linwood Wholesale, total of four boxes, notation RB $2.06.

Manifest, dated May 30, 1950, shipper Lee Brothers, going to Linwood Wholesale, three boxes, notation RB $1.55.

Manifest, dated May 31, 1950, shipper Lee Brothers, consignee Linwood Wholesale, total boxes three, and notation RB $1.55.

Flower manifest, dated June 1, 1950, shipper Lee

(Testimony of William R. Lee.)

Brothers, to Linwood Wholesale, four boxes, with a notation of $2.06.

Manifest, dated June 3, 1950, shows three boxes, $1.55, for Reynolds, Linwood Wholesale as consignee.

Manifest, dated June 5, 1950, shows five boxes going from Lee Brothers to Linwood Wholesale, RB $1.258.

Manifest, dated June 6, 1950, from Lee Brothers to Linwood Wholesale, four boxes, RB $2.06.

Mr. Lee, I just read you from those manifests. Is that a correct reading of the information contained therein? A. That is correct.

Q. And those manifests reflect shipments which you made via the Bay Area Service for the dates indicated? A. That is right.

Q. And to the consignees indicated? [102]

A. That is right.

Q. Mr. Lee, when you started shipping over Bay Area what was the occasion? Did someone request that you ship, or was it your own idea?

A. It was requested by the consignee.

Q. What procedure did you follow to make those shipments over Bay Area?

A. The girl in the office, the shipping department, just called, I believe it was Mr. Reynolds, to pick up the shipments.

Q. I see. Were any questions asked about membership? A. You mean of the girl?

Q. Yes. A. No.

(Testimony of William R. Lee.)

Q. Are you acquainted with Mr. John C. Barulich, who sits at the counsel table of respondents?

A. Yes, I am.

Q. Has he ever been in your office?

A. Yes, he has.

Q. How many times?

A. I would say about three or four times.

Q. Can you recall the substance of your conversations with Mr. Barulich on those various occasions?

A. I don't recall exactly the conversation now, but it was concerning membership in the Bay Area Association. [103]

Q. Did Mr. Barulich ask you to join the Bay Area Association? A. Yes, he did.

Q. Did he mention a membership fee?

A. I don't recall whether he did or not.

Q. Did he mention that in order to become a member you would have to fill out a membership application?

A. I think there were contracts, agreements, to be signed.

Q. Can you remember whether he so stated?

A. No, I don't recall whether he did or not, but I believe he knew that I was familiar with the usual agreements that go with the contract.

Q. Did he suggest shipping your merchandise over Bay Area for a trial period before joining?

Mr. Gaudio: Mr. Examiner, the witness testified that Mr. Barulich was in his office on a couple of occasions, although the dates we don't have, and

(Testimony of William R. Lee.)

talked very briefly, and he suggested that he be a member. I haven't objected because I want to get this witness behind us, but I think we ought to have a more accurate foundation, and I certainly object to leading questions. I can't anticipate what objection to make if I have a valid objection, if a leading question is asked.

Examiner Walsh: Rephrase your question, and let's try [104] to have the testimony in a little more positive form.

If we run into a negative reply, don't predicate any questions on anything that might have been developed if the answer to that question should be in the affirmative, if you know what I mean. I would like a little more continuity in the questioning.

Q. (By Mr. Stowell): Can you recall whether Mr. Barulich's visits preceded the time that you made these shipments, or did any of Mr. Barulich's visits precede the time of such shipments?

Examiner Walsh: If you recall.

Mr. Stowell: If you recall, Mr. Lee.

A. I couldn't say exactly whether they preceded or followed his visits.

Q. (By Mr. Stowell): Have you ever been a member of Bay Area? A. No.

Q. Have you ever made any sort of payments to Bay Area by way of dues or initiation fees?

Q. Have you ever made an application to Bay Area for membership? A. No.

(Testimony of William R. Lee.)

Q. Mr. Lee, I show you a document which has on it the heading: "Consolidated Flower Shipments, Inc., Bay Area," with a little pink slip attached: "Notice to All Members: [105] The attached memorandum of rates prepared at the request of the members for the determining of decorative greens rates by air as offered to the various listed destinations by the various listed air lines."

Have you ever seen this document before?

A. No, I have never seen this document.

Mr. Stowell: I have no further questions, Mr. Examiner.

Examiner Walsh: Cross-examination, Mr. Gaudio.

Cross-Examination

By Mr. Gaudio:

Q. Mr. Lee, when you met Mr. Barulich, was that the first knowledge you had of the existence of Bay Area, or was it some prior knowledge?

A. I had knowledge about it previous to that.

Q. From whom did you first learn about Bay Area?

A. From Mr. Decia and Mr. Reynolds, I believe, originally.

Q. As between them, which one, Mr. Reynolds?

A. They both called on me.

Q. Both called on you at the same time?

A. Yes, that is right.

Q. When was this?

(Testimony of William R. Lee.)

A. I can't recall the exact date. It would be approximately three or four years ago. [106]

Q. Before the first occasion of your shipment on February 25, 1950? A. Yes, it was.

Q. And prior to that time, I take it, you never had shipped anything via Bay Area?

A. I don't know whether we shipped prior to the time Mr. Barulich called on us——

Q. I am speaking of the conversation with Mr. Reynolds.

A. No, I don't believe they had organized, and they weren't in business at that time. Prior to the time they called on us, to my knowledge.

Q. And was the conversation which you had with Mr. Reynolds and Mr. Decia relative to your becoming a member? A. Yes.

Q. Did you accept to participate in the organization at that time? A. No.

Q. Did they present to you a document which you should sign? A. They did.

Q. And you didn't sign it?

A. No, I didn't.

Q. You refused to become a member as suggested by them? A. That is correct. [107]

Q. And when you, as you say, were requested by Linwood Wholesalers, the Florist, to ship via Bay Area? A. That is correct.

Q. Was that before this first shipment on February 25, 1950?

A. Was a request made from the consignee before that time?

(Testimony of William R. Lee.)

Q. Yes. A. Yes, prior to the shipment.

Q. And had you had your conversation already with Mr. Reynolds? A. I believe so.

Q. When you received that request did you communicate with him at all?

A. Only to the extent of telling him we had boxes for him, had shipments for him.

Q. What did he do?

A. He picked up the boxes.

Q. At that time did you discuss further the question of your possible membership in the group?

A. No.

Q. Was Mr. Barulich with the organization in February, 1950? A. That I can't answer.

Q. You don't remember? [108]

A. I don't remember.

Q. Did you call anyone or discuss the question with anyone other than Mr. Reynolds at that time as to whether you should deliver these boxes for handling by Mr. Reynolds or Bay Area?

A. No, I didn't speak to anyone else. In fact, I didn't speak to anyone at all. The girl in the office was the one that called for the truck to drop by to pick up the boxes.

Q. Do you mean that you didn't have any knowledge of the fact that Mr. Reynolds was picking up boxes via Bay Area? A. Yes.

Q. When did you first discuss with Mr. Reynolds or have any communication with him that he was to pick up your shipments for Detroit?

(Testimony of William R. Lee.)

A. It was just taken for granted. We knew that he was handling the shipments, so we called him.

Q. So you had no discussions with Mr. Reynolds, then, as to whether you should or should not deliver the boxes to him for handling? A. No.

Q. And you had no discussions with anyone of Bay Area whether you should or should not; is that correct? A. That is correct. [109]

Q. Have you shipped anything since June 6, 1950, via Bay Area?

A. Not according to our records. At least, we couldn't find any other manifests aside from these.

Q. Have you any explanation for your discontinuance of shipments via Bay Area to Linwood Wholesalers in Detroit?

A. The reason why we didn't ship it was because we felt that there was some talk that we couldn't ship through Bay Area without becoming members, so we just told the customer we didn't have that service available for him.

Q. Did Mr. Barulich tell you that?

A. No.

Q. Did Mr. Reynolds tell you that?

A. No.

Q. Do you know who it was that told you?

A. We just assumed it, because there was some talk going on that we couldn't ship as members.

Q. When you say "we" are you including yourself, Mr. Lee?

A. I am including our firm.

(Testimony of William R. Lee.)

Q. Your firm isn't testifying. You are testifying. Are you including yourself?

A. That is right.

Q. Now, do you have any knowledge as to where this information, as you refer to it, developed, that Bay Area [110] couldn't handle your account?

A. No, I don't.

Q. So, if there was any such information, it was because someone else told you or told some other member of your firm? A. That is right.

Q. And that is the only reason you can assign at this time for discontinuing the use of Bay Area's facilities? A. That is correct.

Q. Did any representative of Bay Area since June 6, 1950, notify you in so many words or to the effect that unless you were a member of Consolidated Flower Shipments, Inc., Bay Area, you could not avail yourself of the service?

A. No, not to my knowledge.

Q. Not to your knowledge? A. No.

Q. How many members are there in your firm?

A. We have an office staff of four.

Q. Are you the sole proprietor or is it a partnership? A. It is a partnership.

Q. Who is the other member?

A. Harry W. Lee, Frank Young, and Mrs. S. Lee.

Q. Do you know whether they had had any conversations with representatives of Bay Area regarding the use of their [111] service? A. No.

(Testimony of William R. Lee.)

Q. So apparently, if I understand your testimony correctly, someone, either yourself, or a member of your firm, assumed——

A. Assumed that we couldn't ship by them, not being members. I, myself, assumed that.

Q. Unless you were members?

A. That is right.

Q. And not seeing fit to become a member or apply for membership, you discontinued the use of their service, is that correct?

A. That is correct.

Mr. Gaudio: No further questions.

Examiner Walsh: Mr. Wolf?

Mr. Wolf: No questions.

Mr. Stowell: I have just one or two.

Redirect Examination

By Mr. Stowell:

Q. Mr. Lee, do you have any personal knowledge as to whether any other people, non-member growers or wholesalers in this area—that is non-members of Bay Area—ever shipped via Bay Area's service?

A. I have no knowledge of that.

Q. Is it a fact, Mr. Lee, that these flower manifests [112] reflect flower shipments which you made, and which were subsequently consolidated by Bay Area into consolidated shipments?

Mr. Gaudio: If he can answer that question.

Mr. Stowell: If you can answer it.

(Testimony of William R. Lee.)

A. It is my understanding that they would be consolidated.

Q. (By Mr. Stowell): Do you have the copies of the air bills which go with these manifests?

A. I don't believe we have.

Q. Did you ever receive such copies of air bills?

A. I don't think so.

Q. Do you have any knowledge as to what this entry means on these manifests, "Adjust to Charge $35.63?" For example, on the manifest dated June 6, 1950.

A. My understanding is that that charge is the consolidated charge for that particular shipment.

Mr. Stowell: No further questions, Mr. Examiner.

Examiner Walsh: Recross, Mr. Gaudio?

Mr. Gaudio: Yes.

Recross-Examination

By Mr. Gaudio:

Q. Were these consignment sales?

A. No. [113]

Q. These were straight shipments?

A. That is right.

Q. So you don't know whether they were consolidated or not, then? A. No, I don't.

Q. Mr. Lee, I show you a letter dated April 4, with a number of blank lines apparently for signatures. Have you ever seen a document like this before? A. No, I haven't.

(Testimony of William R. Lee.)

Q. Was one such document like this ever presented to you by a man by the name of Reynolds, of Reynolds Brothers Transfer & Storage Company, or Mrs. Decia?

A. No, I have never seen this document.

Mr. Gaudio: Thank you.

Mr. Stowell: I have no further questions.

Mr. Wolf: I have a question.

Examiner Walsh: Mr. Wolf.

Q. (By Mr. Wolf): Mr. Lee, you testified in answer to a question several times that you were requested to ship by Bay Area—that is, your consignee requested you, and you did ship via Bay Area. What do you mean by that answer, that you did ship via Bay Area?

A. That we did ship via Bay Area?

Q. Yes. What does that mean? [114]

A. Well, we routed the shipment through Bay Area. In other words, they picked up the shipment, and I suppose forwarded it on through whatever air line they used.

Mr. Wolf: Thank you. No further questions.

Examiner Walsh: Are there any further questions?

Mr. Gaudio: Nothing further.

Examiner Walsh: You may be excused. Thank you, Mr. Lee.

(Witness excused.)

Examiner Walsh: Show Mr. Reynolds resuming the stand.

Whereupon,

CLYDE E. REYNOLDS

resumed the stand, was examined, and testified further as follows:

Direct Examination
(Continued)

By Mr. Stowell:

Q. Mr. Reynolds, did I just show you copies of manifests from which I read pertinent information into the record a short time ago?

A. You did.

Q. From your examination of such manifests would it be your testimony that they in fact comprised consolidated shipments over Bay Area?

A. Yes.

Q. Prior to the recess, Mr. Reynolds, we were discussing [115] payments which you made to John C. Barulich.

Would you examine this chart, please. This chart is a listing of the Reynolds Brothers checks issued to John C. Barulich. Is that an accurate listing of the checks and check numbers taken from your personal check stubs and records?

A. To the best of my knowledge. Of course, I can't remember the figures.

Examiner Walsh: Was Mr. Reynolds present at the time?

Q. (By Mr. Stowell): Was this done in your

(Testimony of Clyde E. Reynolds.)

presence by a member of the Civil Aeronautics Board? A. Yes.

Q. And was this shown to you at the time?

A. I believe not. I believe it was shown to Mrs. Serel, our bookkeeper, but she had the records in a book, and she had taken the records right out of the books, which had been audited.

Q. All right.

Mr. Stowell: At this time, I intend to read from this list: Check No. 1565, dated December 22, 1949, amount of $72, endorsed by Mr. Barulich.

Check No. 1592——

Mr. Examiner, I wonder if it would be agreeable to have these figures copied into the record by the reporter in lieu [116] of my reading them at this time.

Mr. Gaudio: That will be agreeable, if it is understood that Mr. Reynolds will adopt the chart as his testimony.

Q. (By Mr. Stowell): Mr. Reynolds, do you adopt this chart as your testimony, in lieu of my reading it and asking you whether these individual items in fact were taken from your records, and so forth? A. Yes, I do.

Examiner Walsh: Are you going to have it copied into the record, then?

Mr. Gaudio: Just a moment, Mr. Wolf, if you will please not examine that. That is in connection with a motion.

Mr. Stowell: I am sorry. Do you want this to go into the record?

(Testimony of Clyde E. Reynolds.)

Mr. Gaudio: Well, that is part of the objection.

Examiner Walsh: What is that now? I do not quite follow.

Mr. Gaudio: It didn't occur to me until I saw Mr. Wolf reading it. But it relates to income payments of Mr. Barulich by Mr. Reynolds, and I am objecting in connection with our motion.

Mr. Stowell: We can do this. I will state at this time that I will reserve this for the executive session.

Mr. Wolf: Mr. Examiner, it is quite true that we are [117] not interested in Mr. Barulich's private income in any way whatsoever, but payments of this nature by one agent or employee of Bay Area, the respondent in this case, to another employee of Bay Area, I wouldn't think would be particularly confidential.

Examiner Walsh: We have Mr. Reynolds' statement for the record that the listing is a true and correct listing of the checks which he had written to Mr. Barulich. We can have that as a part of the public record, and we can reserve this whole thing, the total figure there, to be taken in executive session.

Do you understand what I mean?

Mr. Stowell: I am sorry.

Examiner Walsh: Mr. Reynolds has already verified that this statement that you have drawn up is a true reflection of the checks which he drew in favor of Mr. Barulich.

(Testimony of Clyde E. Reynolds.)

Now, you can read into the record the dates of these checks now, and we can reserve the amounts and the total figure to be taken in executive session.

Mr. Stowell: At this time, then, I will ask the reporter to copy into the record merely the check numbers and the dates, and the balance of the information will be offered at the executive session.

(The information referred to is as follows.) [118]

Number	Date
1565	12-22-49
1592	1- 4-50
1630	1-14-50
1645	1-20-50
1670	1-31-50
1719	2-15-50
1745	2-24-50
1759	3- 6-50
20	3-22-50
1801	4- 2-50
1816	4-12-50
1923	5-16-50
1946	5-27-50
1965	6- 5-50
2004	6-16-50

Mr. Wolf: Mr. Examiner, so that I do not have to examine that document, would counsel tell us over what period of time this extended?

Examiner Walsh: Yes, he can do that.

(Testimony of Clyde E. Reynolds.)

Mr. Stowell: The first entry is December 22, 1949, and the last entry is June 16, 1950. The last check which was observed in Mr. Reynolds' records was that one.

Examiner Walsh: Let me make a statement. That does not [119] mean that you will be precluded from cross-examining on any of this data, because you will be permitted to do that at the executive session.

Do we understand each other?

Mr. Wolf: I see.

Mr. Stowell: Mr. Examiner, it is my understanding that at the executive session counsel for the complainants would be excluded.

Examiner Walsh: No, sir. They will be sworn to secrecy, but they will not be excluded.

Mr. Wolf: I see.

Examiner Walsh: Airborne is a party to this proceeding for the purpose of having this complaint decided.

Q. (By Mr. Stowell): In order to summarize part of your testimony for a certain period of time, there were three people in that office, there was yourself, there was Mr. Barulich, and Mr. Lloyd, and Mr. Lloyd received a salary from your funds of $80 a week. A. That is right.

Could I correct that?

Q. Yes.

A. There were two in the office. That is, Mr. Barulich and Mr. Lloyd, and I was on a truck.

(Testimony of Clyde E. Reynolds.)

Q. I am sorry. And Mr. Barulich received this ten cents [120] per box payment from your funds, and was that subsequently changed, that ten cents per box arrangement? A. Not to my memory.

Q. I show you a draft of an agreement between yourself and the various members of the Bay Area group, which indicates that you would receive 40 cents per box for flowers for pick-up.

Would you examine this, please.

Was this agreement executed in connection with the inauguration of ten cents per box payments to Mr. Barulich? A. It was.

Q. Can you remember when you began paying Mr. Barulich 20 cents per box?

A. I don't remember paying him 20 cents a box.

Mr. Stowell: I am sorry, I——

Mr. Gaudio: I was going to object.

Q. (By Mr. Stowell): Was the ten cents per box payment ever changed?

A. Not as long as I was its agent.

Q. Could you tell me what Mr. Barulich's actual performance of duties was while he and Mr. Lloyd occupied the office at the airport?

Mr. Gaudio: Just a moment. That calls for his conclusion, since it refers to a contract of employment, presumably had with Bay Area. [121]

Is that what you are referring to?

Mr. Stowell: Mr. Examiner, it calls for observation——

Examiner Walsh: One at a time. I will hear you, Mr. Stowell.

(Testimony of Clyde E. Reynolds.)

Mr. Stowell: Mr. Examiner, it calls for observation of the duties. I do not mean the duties as created in a job description, but I mean the duties in so far as he was able to observe them, the actual performance of duties.

Examiner Walsh: Mr. Gaudio, do you have any statement with respect to that?

Mr. Gaudio: I think the form of the question is bad. I think what he wants to know is what did he see Mr. Barulich do. If he is referring to what Mr. Barulich's duties were pursuant to a contract of employment, which I assume he has reference to, then that contract with Bay Area would call for his conclusion, unless he were a party subscribing to that agreement.

Examiner Walsh: Do you have a contract executed by Mr. Barulich with Bay Area?

Mr. Stowell: Not with this witness.

Let me rephrase the question.

Q. (By Mr. Stowell): What did you observe Mr. Barulich doing while he occupied the operations office at the airport?

A. Frankly, nothing that wasn't already being done. [122] He was hired as a traffic man by the Association, which was the cause of all the misunderstanding.

Mr. Gaudio: Just a moment. I will ask that the answer be stricken as not responsive.

Examiner Walsh: The latter part of the answer will be stricken.

(Testimony of Clyde E. Reynolds.)

Q. (By Mr. Stowell): Just state if he solicited people, to your knowledge. Just what did you see him do?

Examiner Walsh: Let's have Mr. Reynolds' statement as to what his understanding was of Mr. Barulich's duties and what he was supposed to do. We have a relationship established here between Mr. Reynolds and the Association and Mr. Barulich. Now let's hear what the witness has to state as to his understanding.

The Witness: My understanding was, like I stated before, that Mr. Barulich came in to relieve Tal Lloyd, which was acting as a traffic manager as far as we were concerned. He was doing all the routing and checking on any claims there might have been, and he was taking all orders.

My understanding was that Mr. Barulich when he came in was to relieve Mr. Lloyd in this job, but it didn't work out that way. [123]

Q. (By Mr. Stowell): After Mr. Barulich came in did Mr. Lloyd continue to make up the air bills—— A. He did.

Examiner Walsh: Just a minute. Don't answer until he finishes his questions, Mr. Reynolds.

Q. (By Mr. Stowell): The air bills and the manifests? A. He did.

Q. Did you ever see Mr. Barulich call anyone on the telephone? A. Yes.

Q. Can you recall whom he might have called?

A. No, no one in particular. I know that he talked to Mr. Bonaccorsi, and Mr. Zappettini.

(Testimony of Clyde E. Reynolds.)

Q. Can you recall the nature of any of the conversations he may have had on the telephone?

A. They were in regard to flower shipments.

Q. Did he ask anyone to ship over Bay Area on the telephone?

A. I can't rightly answer that, because that is naturally what the conversations were all about, Bay Area, when he was talking to these different customers. They were already members at the time, most of them.

Q. Do you personally know whether Mr. Barulich called on any flower growers? [124]

A. Yes, I do know that he did.

Q. Can you tell me whom he called upon, if you know.

A. Yes, he called on Mr. Zappettini, Mr. Bonaccorsi, Mrs. Decia, and numerous others.

Q. About when did you terminate your arrangements with the Bay Area group?

A. I believe you have the records. I couldn't state. Possibly July of 1950, I believe, as near as I can remember.

Q. August 24, 1950, does that sound reasonable?

A. No, it was before then, because Mr. Barulich had taken over approximately a month to sixty days after my agreement with the shippers to discontinue as their agent.

I hauled for Barulich at the time—for the Association, rather. I had no exact date.

Q. Is it true that you paid Mr. Barulich only

(Testimony of Clyde E. Reynolds.)

five cents per box when the box was deposited at the airport by the shipper? A. That is right.

Q. After Mr. Lloyd terminated his employment in connection with this particular operation, can you tell us what Mr. Barulich's duties were? Again, can you tell us what your observation of his duties was?

A. Yes. When Mr. Lloyd left I left at the same time. Lloyd and I left at the same time, and Mr. Barulich took [125] over.

Q. Of your personal knowledge do you know if the Association paid anyone any salary?

A. Not to my knowledge.

Mr. Gaudio: I submit that calls for a conclusion, Mr. Examiner, unless they paid Mr. Reynolds.

Mr. Stowell: Well, he doesn't know.

Examiner Walsh: The answer is no.

Q. (By Mr. Stowell): Did you receive any compensation to act as agent of Bay Area?

A. No.

Q. Did anyone else own office equipment at the operations office besides yourself and Aviation Activities, Inc? A. No.

Mr. Gaudio: During what period?

Mr. Stowell: During the period of your operation.

Examiner Walsh: I think we will have to assume it was during the period that Mr. Reynolds was connected with the Association.

Q. (By Mr. Stowell): Did you pay any of the legal expenses incurred in the incorporation of Bay Area?

(Testimony of Clyde E. Reynolds.)

A. Only for my own protection and information —yes, I did, too, because Mr. Walter Truce, who was our attorney, [126] I think he incorporated the papers, and I either paid all of it or half, I don't recall offhand.

Q. But it is your testimony that you paid at least a substantial portion of the legal expenses and billing submitted by attorneys for the incorporation of Bay Area? A. At first, yes.

Q. When a shipper called your office and asked you to pick up boxes did you or your assistants or people working under your supervision check to see whether the person making the request was a member of the Bay Area group?

A. Yes, that was the understanding, that nobody could ship that was not a member, and so therefore the lady at the office was informed not to haul any boxes for anybody that was not a member.

Q. Did she have a membership roster?

A. She did have. To my knowledge there was nobody shipped that was not a member.

Q. Who was the lady that you mentioned?

A. Mrs. Ann Serel.

Q. Do you know from whom she received this membership roster? A. Myself.

Q. Did you make up the roster, or did you in turn receive it from someone else?

A. Partially. I believe they were printed at California Floral on a mimeograph machine there, which was [127] drawn up by the members of the Board, and I and Mr. Decia went out and got the signatures for those.

(Testimony of Clyde E. Reynolds.)

Q. In other words, did you use the roster of names of the people who signed that letter which I showed you earlier in the examination?

A. I believe that is the original one. Later we had another one.

Q. When you say "we," whom do you mean?

A. Well, acting as an agent I say "we," because at that time I was the contact man. I saw everybody that didn't show up at a meeting, all the growers and shippers, and went around and contacted them. And when I say "we," I mean the Bay Area Incorporation.

Q. This particular membership roster, who decided when a name was to be added over and above the original names who signed that letter?

Mr. Gaudio: Mr. Examiner, I object to the question. It calls for a conclusion.

Mr. Stowell: Mr. Examiner, he maintains that he kept the roster, and he used the word "we," and I think I am free to——

Mr. Gaudio: You are referring now to the basis for membership applications, the passing on membership applications, and I might point out, Mr. Examiner, I don't mean to inject my views on procedure here, but the articles of incorporation [128] as to this group are going to be very pertinent in that respect, and it would call for his conclusion unless he were an officer of the group.

Examiner Walsh: The original members and the requirements for membership by other persons not already members?

(Testimony of Clyde E. Reynolds.)

Mr. Gaudio: Yes.

Mr. Stowell: All that is p e r t i n e n t, Mr. Examiner, but if he testifies that he maintained the roster, perhaps the practice deviated from the articles.

I am now trying to determine what actually membership consisted of.

Q. (By Mr. Stowell): Let us begin this line of inquiry over again.

The membership roster which you used to determine whether shipments should be accepted by you consisted at the outset of the signatures to that April 4 letter; is that correct?

A. If I remember right, that April 4 letter, we had several more added at a later date, but that first one was just six or eight, I believe.

Q. Now, when others were added——

Mr. Gaudio: Just a moment, Mr. Examiner.

Mr. Stowell: He testified that others were added, Mr. Examiner.

Examiner Walsh: One at a time. Mr. Gaudio, do you have an [129] objection?

Mr. Gaudio: Yes. I have an objection on the ground that any addition of membership to Bay Area, Inc., the Association, is on the basis of applications, and the requirements thereunder. The question calls for the conclusion of this witness, without a proper foundation laid.

Mr. Stowell: Mr. Examiner, it is a proper line of inquiry to ask him if he has this membership

(Testimony of Clyde E. Reynolds.)

roster, if he maintained it, where he got the information to add names, whether he used this roster as a basis for accepting shipments. I am not asking him whether in fact those people became members according to the prescribed ritual. I am asking him whether he accepted shipments on that basis, how that basis may have changed, from where he got the information to change the practice. The practice might have deviated from the prescribed rules.

Examiner Walsh: I will allow the witness to answer, but please be careful and lay proper foundations as you go along, because some of the answers are confusing.

Q. (By Mr. Stowell): Let us begin over again.

You had a record which you used as a basis to determine whether shipments should be accepted; is that correct? A. That is right.

Q. How was this record made up? [130]

A. It was a list of names.

Q. From whom did you get the list of names?

A. From the secretary of the Association.

Q. Did you accept the names which she gave you automatically for your record? A. Yes.

Q. And as names were added they were secured from the secretary of the association; is that correct? A. Yes.

Q. Did you ever refuse to accept any shipments?

A. Not from a member.

Q. Just answer my question.

(Testimony of Clyde E. Reynolds.)

A. Well, there are two questions there.

Q. Did you ever refuse to accept any shipments at all? A. No.

Q. In other words, any person who called you to pick up shipments you proceeded to pick up those particular shipments for Bay Area; is that correct?

A. That is wrong.

Mr. Gaudio: Objection, Mr. Examiner.

Examiner Walsh: I am going to sustain that objection, unless there is a proper showing here that shipments were picked up by specified individuals. We cant' have testimony coming into the record in such an abstract manner. I think [131] that if this witness is going to testify as to whether he received shipments from non-members of the Association we should have some proof as to what shipments were received and have an identification of the persons or firms that these shipments were received from.

To that extent I will sustain the objection, unless it can be shown in the way I have already suggested.

Q. (By Mr. Stowell): Can you recall whether shipments were accepted from any non-members?

Mr. Gaudio: By Reynolds Brothers Transfer Company?

Mr. Stowell: By Reynolds Brothers Transfer Company. A. Yes.

Q. (By Mr. Stowell): Who?

A. Now, I will say it the way I want to.

Mr. Gaudio: Just a moment. You are going to

(Testimony of Clyde E. Reynolds.)

say it, if the Examiner will excuse me saying so, in answer to the questions asked, Mr. Reynolds. Otherwise, I am going to object to any voluntary statements by the witness.

Examiner Walsh: Any statement that we should have on the record is with respect to certain specified shipments that were received from non-members, and in the absence of any such showing as that, testimony to the effect that shipments were received from non-members without anything else, is [132] meaningless. That is my ruling.

Q. (By Mr. Stowell): Can you tell me the names of persons who were non-members who shipped with Reynolds Brothers over the Bay Area service? A. I have none, no.

Q. You don't know of any? A. No.

Q. Do you know if V. Pierce ever shipped via Bay Area?

A. Not to my knowledge. V. Pierce, if I recall him right, is an employee of L. Enoch. To my knowledge he is not a member of the Association.

Q. Did D. Brunetti ever ship via Bay Area?

Mr. Gaudio: All of these questions are during his term of service?

Mr. Stowell: Obviously.

A. To my knowledge, no.

Examiner Walsh: It is quite obvious that he would have no knowledge of the workings of the Association after he severed his connection, so we must proceed on that assumption.

(Testimony of Clyde E. Reynolds.)

Q. (By Mr. Stowell): I show you a list called Consolidated Shippers and Growers, Inc., Flower Manifest List, and ask you to examine it, [133] please.

A. To my knowledge they were all members.

Mr. Stowell: I am sorry. I haven't asked you a question yet.

Mr. Gaudio: Well, he is talking.

Examiner Walsh: Strike that apparent response.

Q. (By Mr. Stowell): Does this document reflect the purchase of manifests during the period when you functioned in connection with Bay Area?

A. It does.

Mr. Stowell: Mr. Examiner, I move that this document be marked for identification as EA-73, Mr. Examiner.

Do you intend, Mr. Examiner, to follow the procedure of offering documents into evidence at the close of direct, or the close of direct and cross? What procedure do you desire followed for offering the exhibits into evidence?

Examiner Walsh: I have no particular choice. Do you have any suggestion, Mr. Gaudio?

Mr. Gaudio: Of course it is his evidence. Any time he wants to offer it in evidence I can certainly object and have the legal objections appear at that time. But certainly before the witness leaves the stand.

Mr. Stowell: At this time, Mr. Examiner, I move

(Testimony of Clyde E. Reynolds.)

that Enforcement Attorney's Exhibits 1 to 73, inclusive, be admitted into evidence, which have been previously marked and identified. [134]

Examiner Walsh: Any objection?

Mr. Gaudio: No objection, Mr. Examiner.

Examiner Walsh: Enforcement Attorney's Exhibits 1 through 73 are received in evidence.

(The documents marked as Enforcement Attorney's Exhibits Nos. 1 through 73, inclusive, were received in evidence.)

Mr. Stowell: I have no further questions of this witness.

Examiner Walsh: We will recess at this time, gentlemen, and we will reconvene at 2:15.

(Whereupon, at 1:10 p.m., a recess was taken until 2:15 p.m. of the same day.) [135]

Afternoon Session, 2:15 P.M.

Examiner Walsh: Come to order, gentlemen.

You may cross-examine, Mr. Gaudio.

Whereupon,

CLYDE E. REYNOLDS

resumed the stand and testified further as follows:

Cross-Examination

By Mr. Gaudio:

Q. Mr. Reynolds, I believe you testified that you were one of the instigators, to use your words, in

(Testimony of Clyde E. Reynolds.)

the organization of the group which is now known as Bay Area; is that correct?

A. That is right.

Q. Have you any records that will tell us at this time the dates of the members that you personally procured on that letter of June 14, I believe it was?

Mr. Stowell: April 14.

Mr. Gaudio: April 14, 1949.

A. I believe I have the records in the office.

Q. You have them? A. I am quite sure.

Q. The original documents which were signed by these members?

A. I am not positive. I believe I have.

Q. Will you produce them at this hearing at a later date? [136] A. Yes.

Mr. Gaudio: For the record may I ask that the witness be instructed accordingly.

Examiner Walsh: Let the record show that such documents will be submitted by Mr. Reynolds. I will suggest that you contact Mr. Stowell as to the manner in which he wants them handled.

Do you want them submitted before we conclude the hearing?

Mr. Gaudio: Before we conclude the hearing, yes.

Q. (By Mr. Gaudio): At the meeting where you say you first met the organizers of Bay Area, I believe you named Mr. Zappettini, Mr. Bonaccorsi and Mr. Enoch. Mr. Barulich was not present at that meeting? A. He was not.

(Testimony of Clyde E. Reynolds.)

Q. To your knowledge, at any rate, Mr. Barulich did not enter this picture until September of 1949, I believe you said; is that correct?

A. Approximately.

Q. At that time was any discussion had between these people regarding the arrangements and the basis on which you would undertake to handle the trucking end of the business?

A. I don't recall. Only that he was brought in as traffic manager, and the agreement was made to pay him so much [137] per box.

Q. Insofar as you were concerned what was the basis of your handling the pickup and hauling to the air port?

A. As far as I was concerned, I got the 40 cents for a box that I picked up and actually I got 50 cents, but 10 cents of that was to go toward Mr. Barulich's salary.

Q. When you refer to Mr. Barulich you are referring to the consolidation work in the office? Is that what you are referring to?

A. Referring to him as the traffic manager.

Q. As the traffic manager?

A. That is right.

Q. Did you ever see or read the contract of employment, if there was one, between Mr. Barulich as traffic manager and the Association?

A. I could answer that yes and no. I probably did, but I don't recall.

Q. You don't recall its specific provisions or

(Testimony of Clyde E. Reynolds.)

what duties were assigned to him as traffic manager?

A. Just traffic manager is all I recall.

Q. And for acting as traffic manager you agreed to pay him 10 cents out of your fifty cents?

A. That is right.

Q. That arrangement continued until about when, if you recall exactly? [138]

A. I believe June of 1949, if I am not mistaken. It might have been '50.

Q. Let me put it this way: Was it during the time that Mr. Lee, who testified earlier, shipped?

A. Yes, I am quite sure.

Q. And then sometime soon after that, I believe you said you terminated your arrangements with Bay Area? A. That is right.

Q. Wasn't that about the time, if you know, when the service offered by the carriers previously referred to as collect distribution was discontinued?

A. Perhaps after that. I don't recall.

Q. Shortly after that, was it not?

A. I don't recall. It wasn't at that time, to my knowledge.

Q. At least for a substantial portion of the period when you handled the trucking collect distribution was in effect, was it not?

A. Yes and no.

Q. Well, will you explain your answer.

A. Because the tariff said collector distribution. It didn't say either or both.

Q. And eventually the service was discontinued

(Testimony of Clyde E. Reynolds.)

pursuant to some requirement or rule of the Civil Aeronautics Board, was it not? [139]

A. I remember that part of the lines did and part of them didn't.

Q. During this period when collected distribution was indulged in a good many of these services or the arrangements for the handling of consolidated shipments were in fact handled by the airlines direct; is that right? A. Partly.

Q. Mr. Reynolds, would you say that the discontinuance of the collect distribution feature of the direct carrier service was a contributing factor in the calling in of Mr. Barulich to act as traffic manager?

A. No.

Q. You would not? A. No.

Q. After the collect distribution was discontinued were the services formerly conducted by the air line performed by you, until Mr. Barulich came in? A. Yes, and afterwards also.

Q. I believe you testified earlier that Waldier & Truce was your attorney? A. That is right.

Q. I show you what appears to be a three page document prepared on legal paper from the law offices of Waldier & Truce, Attorney's at Law, and ask if you are familiar with that document? [140]

A. Yes, I recall it.

Q. This notice, let's call it, was issued by your attorneys, addressed to Consolidated Flower Ship-

(Testimony of Clyde E. Reynolds.)

ments, Inc., Bay Area, pursuant to your instructions? A. That is right.

Mr. Gaudio: May I ask that this be identified as Respondent's Exhibit first in order at this time.

Examiner Walsh: Addressed to Consolidated Flower Shipments, Inc., Bay Area. I do not see a date.

Mr. Gaudio: It doesn't appear to be dated.

Examiner Walsh: The document is signed by Clyde E. Reynolds, in behalf of Reynolds Transfer & Storage Company. The document appears to be undated.

It will be marked for identification as Consolidated Flower Shipments' Exhibit No. 1. We will use the symbols "CF." Do you have a symbol that you have used?

Mr. Gaudio: Inasmuch as we have always referred to it as Bay Area, we might call it "BA."

Examiner Walsh: We will make it BA-1. The above described document will be marked for identification as Exhibit BA No. 1.

(The document above referred to was marked for identification as Bay Area's Exhibit No. 1.)

Q. (By Mr. Gaudio): Mr. Reynolds, this notice, apart from notifying [141] Bay Area of certain things, has two alternative provisions which you submitted to them at that time as to the method of handling; is that right? A. That is right.

Q. The first one, which appears at page 2 under paragraph (a) states as follows:

(Testimony of Clyde E. Reynolds.)

"We offer to contract with your members for a period of not less than one year, providing for exclusive use of our facilities to transport your flowers to San Francisco Airport at a flat rate of 35 cents per 5-foot box or smaller, weighing approximately 40 pounds or less. Our responsibility would end upon delivering the flowers to a designated point at the airport. Under those circumstances are we to have anything to do with the preparing or assembling of your flowers for the airfreight shipment at the airport?"

And the other alternative under caption (b), page 2, reads as follows:

"We offer to pick up and deliver to the San Francisco Airport flower shipments, and prepare and assemble such flower shipments at the airport for air transportation at the flat rate of 50 cents per 5-foot box or smaller, weighing approximately 40 pounds or less. Where the shipment is deposited at the assembly area at the airport by the shipper the rate would be 25 cents per 5-foot box or smaller, weighing approximately 40 pounds or less. In [142] such case we are to have complete control of the assembling facilities at the airport. This agreement to be by signed contract for a period of not less than one year."

Examiner Walsh: Is there a date given down below? Didn't I notice a date in the last paragraph?

Mr. Gaudio: There doesn't appear to be a date. There isn't a date on this document, is there?

(Testimony of Clyde E. Reynolds.)

The Witness: I don't recall.

Q. (By Mr. Gaudio): Do you recall about when you signed this document which Mr. Truce prepared for you?

A. Perhaps he would have a date on that in his files.

Q. You don't recall approximately when it was?

A. I recall approximately thirty days before the termination of my agreement with the shippers.

Q. And when did you discontinue handling the Bay Area shipments?

A. As an agent, approximately June.

Q. So would you say that approximately May of 1950 was when this notice was delivered or signed?

A. May or June, yes.

Q. That second alternative under paragraph (b) was the method of handling that had been in effect up to the time you signed this notice, where you handled all of the arrangements; was it not? [143]

A. Yes, and no.

Examiner Walsh: I wonder if you could be a little more positive.

The Witness: Yes, because at that time, previous to this Mr. Barulich had come in as traffic manager and had assisted in prorating the charges, but Mr. Lloyd was still working at the office.

Q. (By Mr. Gaudio): What I meant was—maybe you didn't understand my question—whereas alternative (a) you would still be a trucker——

A. At the lower rate, and Mr. Barulich would take full charge of the assembly and distribution.

(Testimony of Clyde E. Reynolds.)

Q. And at the higher rate under paragraph (b) you would handle a shipment right on through to consignment?

A. As before Mr. Barulich came in.

Q. And wasn't that the same basis of compensation that had been in effect up to that time—50 cents a box?

A. Yes, but there was also ten cents of that 50 cents that was taken out of that for Mr. Barulich's salary.

Q. The ten cents was going to come out of paragraph (b), was it not—out of the 50 cents?

A. Paragraph (a) was when Mr. Barulich was handling it, I would merely do the trucking to the airport, and paragraph (b) Mr. Barulich would not enter the picture whatsoever, [144] I would have complete control as before Mr. Barulich came in.

Q. In other words, the ten cents which you might have paid Mr. Barulich under (a) you would thereafter retain for yourself under paragraph (b)?

Mr. Stowell: Mr. Examiner, I think there is some confusion here. Mr. Reynolds testified that the 35 cents was without reference to any ten-cent payment to Mr. Barulich. It is my understanding that 35 cents was to go exclusively to Mr. Reynolds.

Examiner Walsh: That was my understanding, but it does not conflict with the present testimony.

Mr. Stowell: I was getting the impression from the assumptions that you are making that ten cents out of the 35 cents would go to Mr. Barulich.

(Testimony of Clyde E. Reynolds.)

Mr. Gaudio: I wasn't trying to make any impression. I was just trying to get specifically what the basis was before he terminated his arrangement.

Examiner Walsh: You are trying to establish now that if paragraph (b) were accepted then Mr. Barulich would no longer draw ten cents from any of the services. In other words, the services would be under the exclusive control thereafter of Mr. Reynolds.

Mr. Gaudio: That would seem to be the intention in paragraph (b). [145]

Is that your understanding of it, Mr. Reynolds?

The Witness: Yes.

Q. (By Mr. Gaudio): In other words, if (b) were adopted you would terminate your arrangement with Mr. Barulich on the ten cents a box basis?

A. That is right.

Q. But if (a) were adopted then you would continue to pay him the ten cents?

A. No, if it was adopted the shippers would pay him.

Mr. Stowell: That is what I wanted to point out.

Q. (By Mr. Gaudio): What was the single fact as far as Reynolds Brothers was concerned that prompted giving this notice?

A. I felt that Mr. Barulich wasn't doing any good as far as I was concerned as a trucker, and I continued the same service as before with the deduction of ten cents a box for my efforts. That was the reason that I ended the contract.

(Testimony of Clyde E. Reynolds.)

Q. Up until the collect distribution was terminated by the air lines you weren't doing that, were you, Mr. Reynolds? A. Partly.

Q. I mean for Bay Area?

A. Yes, even after Mr. Barulich came in until I left the distribution was still in effect. [146]

Q. When did that end?

A. I wouldn't know. I got out of it before that termination.

Examiner Walsh: I wonder if we might have a little information on the term "collect distribution."

Mr. Gaudio: I don't have that date fixed in my mind at this point.

Examiner Walsh: I mean definition of the term "collect distribution." What is the connotation of that term?

Mr. Gaudio: I think perhaps Mr. Stowell could better answer, Mr. Examiner.

Mr. Stowell: First let me state what distribution is. Distribution is the break bulk and delivery by an air carrier of a consolidated shipment, or in fact any shipment which is susceptible of having several parts to it. Under the present regulations of the Board those may be accepted by air carriers only provided they are prepaid.

Presumably, if I may say this without knowing definitely, the air carriers may have accepted shipments for distribution on a collect basis.

Examiner Walsh: Collecting at the end?

Mr. Stowell: The airfreight charges and the pro-

(Testimony of Clyde E. Reynolds.)

ration thereof would be collected from the consignees.

As I pointed out, that is illegal, and consolidated shipments [147] may only move for distribution provided the consignor, who must be one consignor, prepays, or pays for the shipment in advance.

Examiner Walsh: That is where the term "advance" comes from?

Mr. Stowell: You mean advance charge?

Examiner Walsh: Advance charge.

Mr. Stowell: That is another term, which I would leave for definition by Mr. Barulich.

Mr. Gaudio: The point of my examination was that under the collect distribution that was previously in effect air carriers performed a good deal of the paper consolidation work, because of the collection that they would effect on the other end. When that practice was precluded, except under certain conditions, the service was no longer available.

That is the basis for my interrogation of Mr. Reynolds. And the duty or the responsibility then devolved upon Bay Area personnel to assume the duties and the burdens of actually consolidating the shipments in their facilities at the airport.

Q. (By Mr. Gaudio): I believe you gave your address as Redwood City, Mr. Reynolds?

A. That is right. [148]

Q. The facilities which were taken over at the airport were taken over for the account of Bay Area, were they not?

A. That I wouldn't know. Well, yes.

(Testimony of Clyde E. Reynolds.)

Q. Aviation Activities, as agent, I believe you testified, acted on behalf of Bay Area and subscribed for Bay Area at the airport? A. Yes.

Q. Was any part of the rental, at least while you were in operation there, assessed to Bay Area accounts? A. Absolutely none.

Q. It was all paid out of your personal account?

A. My own.

Q. These manifests that you purchased, as appears on Exhibit EA-73, showing the names of various members, that was merely a roster for your use in prorating the cost of the purchase of the manifest, was it not?

A. That simplified it, made everything uniform. That was for shippers as well as for myself.

Q. This EA-73, entitled "Consolidated Flower Shippers and Growers, Inc., Flower Manifest List," did you compile this list yourself in your office?

A. Well, I know it, but whether or not we compiled it, I feel sure that we did, though, for distributing them through the members. [149]

Q. And prorating the cost of the manifest to the members? A. That is right.

Q. Where did you get the list of the names to use on this roster?

A. From the membership.

Q. From the secretary?

A. Originally it was from the secretary. But we had the names of the membership right there, that we called the shippers with. Presumably they are the ones that they went to.

(Testimony of Clyde E. Reynolds.)

Q. In other words, if I remember your testimony, the secretary, Mrs. Decia, I believe you said, gave you the membership roster, and then you transcribed the names from that roster to this document for the purpose of prorating the cost of the manifests among the members?

A. That is right.

Q. When you received the money from the air carrier was that pursuant to a bill which you sent them, or did they just send it to you from some ledger account of theirs?

A. They were billed monthly.

Q. You billed them monthly?

A. Bi-monthly or monthly.

Q. And in whose name was that sent to the air lines? A. Reynolds Brothers. [150]

Q. You did not use the Bay Area account?

A. I wouldn't say yes or no, but I know that it was received in Reynolds Brothers.

Q. Have you any record in your possession that would disclose the exact status of the billing and transmitting of funds from the air lines to you for that account?

A. I think so. I wouldn't state for sure.

Q. Would you produce those letters at a later hearing, statements from you to the air lines indicating the amounts that should be due or paid to you?

A. I feel quite sure I have those records, and I will produce them.

(Testimony of Clyde E. Reynolds.)

Examiner Walsh: Would that represent a balance, or what charges would that statement represent?

The Witness: The flowers that were hauled. That would be for the month's shipping.

Examiner Walsh: That would be under your collect distribution system?

The Witness: No, it would be my trucking. I charged so much a box to haul them to the airport, and that was added to the bill, and then the air lines were billed for it.

Q. (By Mr. Gaudio): Is that the charge that appears on these invoices of yours as an advance charge? [151]

A. Reynolds Brothers advance charge.

Q. Do you have a similar record—I believe I have asked already—with respect to your cancelled checks or any memoranda as to the basis on which the premises were leased?

A. Yes, I have cancelled checks. You asked me that.

Q. Are you familiar with Mr. Lee who previously testified? A. I have met him, yes.

Q. Were you in the hearing room when he testified? A. I was.

Q. Will you state just how it was that you first came to know Mr. Lee, Mr. Reynolds, under what circumstances?

A. I had hauled flowers for Mr. Lee previous to this, sometime ago. But after the consolidation we were talking about it, and Mr. Decia and I called

(Testimony of Clyde E. Reynolds.)

in his office and tried to get him to go as a member of the Association, and I had thought that he had signed first, but I couldn't say that he did.

Q. In other words, when you and Mrs. Decia called at his office it was your impression that he was one of the original subscribers to the Bay Area Association? A. Not necessarily so.

Q. Or had been admitted to membership?

A. The understanding was it was for the purpose of [152] incorporating, and I thought he had signed as one of the original members at that time, because I know there was talk of his being on the Board of Directors. Now, as to whether he signed, I wouldn't be able to state for sure.

Q. Would it be a true statement to say that in so far as your handling of Lee's shipments were concerned, it was on the assumption that he was a member? A. Yes.

Q. When did you find out that in fact he was not, if ever? A. I don't believe I ever did.

Q. At least until this morning you didn't know?

A. That is right.

Q. That ten cents a box that you undertook to pay to Mr. Barulich, was that ever assessed to Bay Area's account? A. Never.

Q. At least while you were operating?

A. That is right.

Q. I would like to ask you again, Mr. Reynolds —I think it is pertinent here—could you give us a

(Testimony of Clyde E. Reynolds.)

specific date of when you stopped operating as trucker for Bay Area?

A. Mr. Barulich would have that. I do not have it.

Q. I could possibly get it, Mr. Reynolds, but I am just trying to refresh your recollection as to when it was. [153]

A. I can give it to you within two months one way or the other, but that wouldn't be answering your question.

Q. Give us an approximation.

A. I believe it was June of 1950.

Q. Do you recall receiving a telephone call from Mr. Barulich at about that time as to why trucks were not operating that day?

A. No, I did not receive such a call.

Q. Did you ever formally give notice of termination of your arrangements with Bay Area?

A. I did, by letter.

Q. In order that we understand one another, I am referring to your specific contract as agent, trucker and general handler for Bay Area's account, when I ask you for the termination of your arrangements.

Is your testimony the same that it would be about June?

A. To my knowledge, I would say yes.

Q. I show you a letter over what appears to be your signature, dated May 12, and ask you if that was your notice of termination to which you have just testified? A. Yes.

(Testimony of Clyde E. Reynolds.)

Mr. Gaudio: I will offer this as Bay Area's Exhibit next in order for identification.

Examiner Walsh: The letter to Consolidated Flower Shipments, dated May 12, 1950, and signed by Mr. Clyde E. [154] Reynolds, will be identified as Bay Area's Exhibit No. 2.

(The document above referred to was marked for identification as Bay Area's Exhibit No. 2.)

Q. (By Mr. Gaudio): This letter of May 12 concludes by saying:

"We regret that this letter must be considered the 30-day notice of termination required under the agreement dated June 7, 1949."

Would I take it from that that about May 12 you considered your arrangements terminated?

A. That is my understanding, yes.

Q. As a matter of fact, you did nonetheless continue to haul Bay Area shipments after that time when Mr. Barulich was constrained to take over, is that not right?

A. For Mr. Barulich, not Bay Area.

Q. You did haul some shipments for a period of time for Mr. Barulich?

A. That is right.

Q. At that time did you know of his assignment or duty as executive secretary of Bay Area?

A. I did.

Q. How long a time did that operation continue for his account?

A. Approximately six weeks, I would say.

(Testimony of Clyde E. Reynolds.)

Q. Did you notify him or Bay Area of your intention to [155] discontinue to act as underlying trucker for their account?

A. He had no agreement other than verbal, and neither did I have. And that is the way it was entered, verbally.

Q. It was entered verbally by a telephone call from Mr. Barulich asking where the trucks were, was it not? A. No, it was not.

Q. Did you notify him before that that you were discontinuing?

A. I told him two weeks before that.

Q. I mean, the day you suddenly decided to discontinue, did you notify him before your actual discontinuance that you were going to cease?

A. I don't recall.

Q. As a matter of fact, isn't it true, Mr. Reynolds, that the fact of your discontinuance was a consequence of your selling the trucks to Airborne?

A. Not trucks—truck.

Q. Truck. Well, I should say the only truck which was available for Bay Area service at that time. A. No.

Q. What other truck was available?

A. I had four other trucks.

Q. But were you using five trucks in the Bay Area service at the time?

A. Not at the time, but if necessary they were there. [156] I used three or four at different times.

Q. And did you sell all four or five, whatever it was, to Airborne? A. I did not.

(Testimony of Clyde E. Reynolds.)

Q. What kind of a truck were you using for Bay Area's account?

A. A regular ton and a half panel truck.

Q. Was that the only panel truck you had at that time? A. Of that particular type.

Q. The kind that was used in this service; is that right? A. Yes.

Q. And that was the one that you sold to Airborne? A. That is right.

Q. Did you commence trucking operations for Airborne's account at the same time? A. No.

Q. You just sold them a truck?

A. That is right.

Q. When was it that your sale took place to Airborne? A. Approximately August 24.

Q. August 24? A. Approximately.

Examiner Walsh: I assume that is 1950, [157] is it?

The Witness: Yes.

Q. (By Mr. Gaudio): As a man in charge of the physical operation prior to Mr. Barulich's entry into the picture, did you ever have occasion to call upon other transfer or trucking companies or agencies to handle Bay Area flower shipments?

A. By letter.

Q. To whom?

A. Oh, several different ones.

Q. In the Peninsula area?

A. Not here. Not to my knowledge, no, sir.

(Testimony of Clyde E. Reynolds.)

Q. You never made any such requests?

A. I believe when we first started I did, one or two trips only. When it was first started. That was before Mr. Barulich came in.

Q. What companies were they, Mr. Reynolds?

A. He has one truck. It is Redwood City. I don't recall its name.

Q. What kind of equipment did he have?

A. One semi-truck.

Q. Panel type? I mean to say, was it the box type? A. Enclosed.

Q. Was that for some emergency?

A. That particular case was.

Q. Other than that, however, you made no practice of [158] farming out your trucking operations to local haulers? A. I did not.

Q. Was there any reason for that?

A. Well, I had equipment enough to handle it. I didn't have to.

Q. How many employees did you have actually conducting the truck phase of the business?

A. On flowers only?

Q. On flowers only. A. From one to four.

Q. Drivers? A. Drivers.

Q. Handlers?

A. Well, the driver was the handler. Other than Mr. Lloyd at the field.

Q. What were the normal working hours of the trucker, that is, the man who actually did the driving?

A. Approximately six to seven hours per day.

(Testimony of Clyde E. Reynolds.)

Q. Which particular hours of the day, do you recall?

A. From 1:00 o'clock until we got through in the evening.

Q. From 1:00 o'clock in the afternoon until evening? A. Yes.

Q. Your drivers wouldn't be out in the morning?

A. No. [159]

Q. Was there any reason for that?

A. Well, the flowers weren't ready to go at that time.

Q. When did you know that the flowers would be ready to go?

A. Of a morning we would call by phone and find out who was shipping what to where, and we would book space on the planes.

Q. In other words, you made all your pickup arrangements in the morning, and then actually went out and did the physical hauling in the afternoon?

A. That is right.

Q. Did you establish that practice because of any deadlines with the air lines?

A. Yes and no. But we had a deadline with the American at that time, 6:00 o'clock. And we had to be at the field by 6:00 o'clock, otherwise they wouldn't take them.

Q. In other words, this afternoon pickup schedule was based in part on the air line schedules; is that right?

A. In part on that and in part on packing the flowers.

(Testimony of Clyde E. Reynolds.)

Q. Pardon?

A. In part on packing the flowers.

Q. Who did the packing?

A. The shippers.

Q. Do you mean that packing as such in effect controlled the departure time, that is, the pickup time? [160]

A. That is right. They waited of a morning to get their orders in, so therefore we couldn't pick them up until afternoon in most cases.

Q. What is your present occupation, Mr. Reynolds?

A. Reynolds Brothers Transfer & Storage, Household Goods and General Commodities.

Q. You are still hauling general commodities?

A. Yes, contract.

Q. Pardon? A. Contract.

Q. Do you have any common carrier rights?

A. Radial Highway Contract Carrier.

Q. Did you transfer those rights also to Airborne with your equipment?

A. Absolutely not.

Q. You made no transfers of any operating authority to Airborne? A. No.

Q. None whatever?

A. Other than I am not hauling flowers.

Q. Did you have any special operating authority for the hauling of flowers?

A. No, not any more than anybody else.

Q. Maybe I didn't ask the question in the proper form, Mr. Reynolds. [161]

(Testimony of Clyde E. Reynolds.)

You still have operating authorities. Have you sold or assigned or transferred any of your operating accounts to Airborne? A. No.

Q. For hard freight?

A. At one time I quit hauling hard freight, and Mr. McPherson hauled for awhile, while I was out. Then I started back in, and part of the accounts I got back, and part of them Mr. McPherson still has.

Q. In other words, during your absence that took place? A. That is right.

Q. And on your return some of the accounts you resumed and others he retained?

A. That is right.

Q. By the way, Mr. Reynolds, do you have any financial interest in Airborne Freight Flower Traffic? A. I am afraid not.

Q. You have none? A. I have none.

Q. Was this truck that you sold to Airborne the truck used by you in the pickup or hauling of hard freight? A. And flowers.

Q. What was the tonnage capacity rating on that? A. Ton and a half. [162]

Q. Did you ever observe the same of Lee Brothers, the witness who previously testified, on the membership roster of Bay Area at any time?

A. I believe I answered that before. I thought I had, but I wasn't positive.

Q. At least you wouldn't be able to give us a more specific answer until you have checked your records? A. That is right.

(Testimony of Clyde E. Reynolds.)

Mr. Gaudio: I think that is all I have of this witness at this time, Mr. Examiner. Subject to the previous request, I might like to call him as a direct witness. And I might say for the record that I have had him subpoenaed and that he made himself available on presentation of my case in chief.

Examiner Walsh: Very well.

Mr. Wolf.

Q. (By Mr. Wolf): Mr. Reynolds, will you go back in your thinking to the time when Bay Area was first formed as an organization of some type. I think you testified earlier this morning that you and Mrs. Decia called on various flower shippers? Is that right?

A. Mr. Decia and myself, yes.

Q. Was it your idea first to form an organization for the shipment of flowers? [163]

A. Well, yes and no.

Q. Could you answer both sides of that guestion, please.

A. My thought was in the trucking, naturally, and I thought that the shippers could save money, so it was both ways.

Q. That is, the advantages would work both ways? A. That is right.

Q. Who first had the idea about Consolidated Flower Shipments?

A. I believe I started the idea sometime ago.

Q. Did you propose to some of the leading flower growers in the Bay Area locality that they form an organization?

(Testimony of Clyde E. Reynolds.)

A. I met with a bunch of them.

Q. With whom did you meet?

A. Mr. and Mrs. Decia, Mr. Zappettini, Mr. Bonaccorsi, and Mr. Enoch.

Q. Who else?

A. Various shippers. I don't recall them offhand, all of them.

Q. How many flower shippers were there at that time in the Bay Area?

A. I don't recall but it seems to me that it was about 22 that we had signed. [164]

Q. Twenty-two that we had signed? Who was "we"?

A. The Bay Area Association, and myself as agent for them.

Q. Would you say that that was about a third of the entire number of the growers and shippers in the area?

Mr. Gaudio: If he knows.

A. I wouldn't know that.

Q. (By Mr. Wolf): You don't know?

A. No.

Q. You recall, do you not, that when the organization first commenced it started as an unincorporated association? Do you remember that?

A. Yes.

Q. And thereafter it was incorporated, do you remember that?

A. I misunderstood the question.

(Testimony of Clyde E. Reynolds.)

Examiner Walsh: Do you want the question read back?

Mr. Wolf: Yes.

(Question read.)

A. The answer to that is I don't know—a non-profit organization, but it was incorporated, to my knowledge.

Q. It was incorporated, to your knowledge?

A. Yes.

Q. I see. And at that time you say there were about [165] 22 members signed up; is that right?

A. To my knowledge.

Q. Did you solicit those members?

A. Partly.

Q. Who solicited the other part?

A. I think various members contacted each other, as well as Mr. Decia and I going around with this first letter.

Q. When you say various members contacted each other do you mean various members who had signed up contacted those who had not signed up?

A. That is right.

Q. Do you know if all of the flower growers in the area who did outside shipping were contacted?

A. No, I don't know.

Q. About how many did you personally contact?

A. I couldn't give you the exact number.

Q. Do you know how many Mr. Decia contacted?

A. No, I couldn't give you the exact number.

(Testimony of Clyde E. Reynolds.)

Q. Before the organization was incorporated you had contacted some, Mr. Decia had contacted some, and members who had signed up had contacted other members; is that correct?

A. Yes.

Q. And is it fair to state that from time to time during [166] this organization procedure that you met with some of the leading flower growers whose names you have mentioned and discussed those who had signed up and those who had not signed up?

A. There were meetings where all the members would find out if they knew any members that came in. The Board of Directors would do that.

Q. At these meetings, Mr. Reynolds, were discussions had in regard to other members who might come in, or other persons who might come in?

A. I don't recall.

Q. Incidentally, when you were an agent for Bay Area did you ever ship anything for any of their members other than flowers? A. No.

Q. During your direct examination, Mr. Reynolds, you made a statement that was a little hazy to me, at least.

You said that this was about the time when you were looking at that membership list which is Exhibit No. 73, and you said something like this: "I was the contact man, and when they didn't show up at a meeting I called on them."

Do you remember saying something like that?

A. That does sound a little like a gangster. But it was merely—no, I don't recall saying that.

(Testimony of Clyde E. Reynolds.)

Q. Well, you started saying "I was a contact man." [167] That was true, wasn't it?

A. Yes.

Q. What do you mean? Whom did you contact?

A. I meant that I called on different shippers with Mr. Decia before it was incorporated, and afterwards, and was at meetings when different people were there.

Q. After it was incorporated did you call on shippers who were not members?

A. I believe I did.

Q. For what purpose?

A. Just to see if I could be of service to them as a trucker.

Q. Did you call on any flower shippers who were not members of Bay Area for the purpose of asking them to join the organization?

A. I don't believe I did after it was incorporated.

Q. Now, you testified this afternoon when Mr. Gaudio was questioning you that you called on Mr. Lee.

Do you recall that? A. I do.

Q. And when you were first asked you said you called on Mr. Lee to see if he would join Bay Area; is that correct, Mr. Reynolds?

A. That is right, with Mr. Decia at the time.

Q. When was that? [168]

A. That was before the incorporation.

Q. I see. And at that time you knew that Mr. Lee was not a member; is that correct?

(Testimony of Clyde E. Reynolds.)

A. There was no members at that time, no members of Bay Area.

Mr. Gaudio: What was the date, Mr. Reynolds? I can't hear you.

Examiner Walsh: He did not give the date.

The Witness: I don't have it myself.

Examiner Walsh: He stated it was before the Association was incorporated.

Mr. Gaudio: For the record, that would be prior to June 14, 1949.

Q. (By Mr. Wolf): And at that time, as you have stated, Mr. Lee wasn't a member, because there weren't members; is that right?

A. That is right.

Q. And when you took the shipments for Mr. Lee that Mr. Lee has testified about, you didn't know whether he was a member or not?

A. I assumed he was.

Q. Didn't you look at your membership list?

A. Like I say, I looked at the first one. I thought his name was on it. [169]

Q. You thought it was on it? A. Yes.

Q. Was it on it? A. I don't recall.

Q. And after looking at the first one, that means the first membership list? A. Yes.

Q. And after that time you never looked at the list to see if Mr. Lee's name was on it, did you?

A. Not particularly, no. I looked at the list.

Q. As a matter of fact, Mr. Reynolds, you never looked at that list at all, did you? A. I did.

Q. When? A. At all times.

(Testimony of Clyde E. Reynolds.)

Q. Every time a shipper phoned, you looked at the list?

A. It was there by the phone.

Q. Did you look at it? A. Perhaps.

Q. When Mr. Lee phoned to have you pick up his flowers on the several shipments you looked at the list by the phone?

A. There is other help besides myself. I can't do it all. And the girl perhaps takes the orders. I assumed she did. She was told to do so. [170]

Q. You assumed that she looked at the list?

A. That is right.

Q. But you don't know whether she saw Mr. Lee's name on it, do you?

A. I didn't look for her. She was instructed to look, and I wasn't standing there watching her.

Q. Now, Mr. Reynolds, you testified pretty thoroughly about the operations of Bay Area at this end.

What arrangements were made for breaking bulk at delivery points of consolidated shipments?

A. There were agents at the other end.

Q. Who made contact with those agents for the purpose of breaking bulk and distributing?

A. The Bay Area officer wrote letters to them and contacted them.

Q. The Bay Area officer made those arrangements? A. Yes.

Q. Did you make any of them?

A. I wrote some of the letters.

(Testimony of Clyde E. Reynolds.)

Q. I see. But in must of the cities to which deliveries were made the break bulk distributing operations were arranged for by the officers of Bay Area; is that correct? A. To my knowledge.

Mr. Wolf: Thank you, Mr. Reynolds. That is all. [171]

Examiner Walsh: Redirect, Mr. Stowell?

Redirect Examination

By Mr. Stowell:

Q. Mr. Reynolds, do you recall whether you ever accepted shipments for Consolidation via Bay Area for the Floral Service of San Mateo?

A. No, I don't recall of any.

Q. Gregorie? A. I don't recall Gregorie.

Q. Ferrari Brothers?

A. I remember picking up. I don't recall whether they were in a Bay Area shipment or direct.

Q. When you say direct shipment, you mean that you also picked up floral shipments to be sent over air carriers which did not enter into the Bay Area Consolidation? A. That is right.

Q. Did you use Bay Area manifests for those shipments? A. I did not.

Q. How much did you assess as a charge on a direct shipment? A. Fifty cents per box.

Q. The same amount as for a consolidated shipment? A. Trucking was all I did.

May I re-word that? I believe at that time there

(Testimony of Clyde E. Reynolds.)

was 75 cents minimum for a direct shipment, or 50 cents a box [172] thereafter. Now, I might be wrong on that. It was at least 50 cents a box.

Q. But at least if the shipment were two boxes or more it was at the same rate as the Consolidated?

A. The trucking.

Q. Do you recall whether in billing for your advance charges on a direct shipment there was any difference in the manner of billing as compared to billing in respect to advance charges for Consolidated shipments which you picked up?

A. None.

Q. Did you ever pick up any flower shipments for Nurserymen's Exchange?

A. Not to my knowledge.

Q. Was there any restriction in your understanding with the Association that you could not pick up shipments direct from non-members?

A. Absolutely not.

Q. In other words, as far as your understanding with the Association, any shipments which did not enter into a Consolidation you could pick up, any and all flower shipments; is that correct?

A. That is right.

Q. Did you commingle those flower shipments which you picked up from the shippers for direct shipment with [173] the boxes of those shippers intended for Consolidated shipment in the same vehicle? A. Yes.

Q. Did you pick up from one shipper both

(Testimony of Clyde E. Reynolds.)

direct shipments and shipments intended for consolidation? Did that ever occur?

A. Not to my knowledge.

Q. Might it not have been possible where you did not accumulate enough boxes for a consolidation to a certain point that the same shipper might have had enough boxes to be consolidated, and also have direct shipments to a point where a consolidation might not be warranted?

Mr. Gaudio: Mr. Examiner, I will object on the ground that it calls for a speculative answer, and on the ground that it is irrelevant and immaterial.

Examiner Walsh: I think he is trying to find out what Mr. Reynolds actually did in transporting these shipments.

In other words, it involves the question of commingling of direct shipments with the consolidated shipments and the transporting them from the shipper to the assembly point or point of direct shipment. I think we should have an answer on that, if he knows.

The Witness: That is right.

Examiner Walsh: Is the answer yes, that that had been done? [174]

The Witness: Yes.

Q. (By Mr. Stowell): And when you deposited these boxes with the air carrier for physical transportation it might very well have been that you would deliver to the air carrier boxes involving direct shipments and boxes involving consolidated

(Testimony of Clyde E. Reynolds.)

shipments at about the same time? A. Yes.

Q. Can you recall how you paid the telephone bill, or rather can you recall how the telephone bill was directed, in whose name?

A. Reynolds Brothers. I paid the bills.

Q. Can you recall the telephone exchange at that time? A. No, I cannot.

Q. And you continued to pay the telephone bill in your name until you terminated the arrangement under discussion? A. I did.

Mr. Stowell: I have no further questions.

Examiner Walsh: I would like to ask a question of Mr. Reynolds before we recess.

I just want to try to consolidate my thinking a little bit.

Mr. Reynolds, with respect to this question of advance charges and your billing the air line for what they owed you, [175] do I have the picture correct that when you picked up shipments of flowers to be consolidated that you would transport the flowers to the assembly point and there you would also accomplish the task of consolidating shipments, and you bore the expenses up to that point, and the flowers would be turned over to the air carrier, and the consignee would collect at the other end, remit to the carrier, and then you would bill the air carrier for what it owed you, periodically? Is that correct?

The Witness: That is correct.

Examiner Walsh: Mr. Gaudio?

(Testimony of Clyde E. Reynolds.)

Recross-Examination

By Mr. Gaudio:

Q. Mr. Reynolds, let's clarify this so-called direct shipment basis and consolidations, if you will.

Before you ever had any idea of an association you did handle, as I understand it, the transportation of shipments to the airport strictly on your own; is that correct? A. That is right.

Q. Somewhere along the line you conceived the idea that it might be advantageous if the shippers got together; is that right? A. That is right.

Q. Did you by your arrangements with the Association ever intend to discontinue the private trucking enterprise or [176] operations which had been in effect for some time and devote all your attention to Bay Area? A. No, I did not.

Q. In other words, you would offer a service in the trucking of Bay Area shipments if they wanted it, but you didn't intend by that to imply that you were giong to discontinue all other operating arrangements that you had; is that right?

A. That is right.

Q. Now, this proposition which Mr. Stowell referred to could have happened, you say. That is, if direct shipments were tendered by a member and also a shipment for consolidation were tendered, you would have handled it or might have consolidated it in the same shipment? A. No.

(Testimony of Clyde E. Reynolds.)

Q. No?

A. You say a direct shipment for a non-member? A non-member would not have entered into consolidation.

Q. In other words, you handled that separately?

A. That is right.

Q. Now, if a member had a direct shipment, and that member, or another member, had other shipments that might be consolidated with a direct shipment, did that ever occur?

A. If they wanted it to go straight on a bill it went straight, and if they wanted it consolidated I consolidated [177] it.

Q. In other words, you abided by the members' instructions in that respect?

A. That is right.

Q. You didn't assume the responsibility?

A. That is right.

Mr. Gaudio: That is all.

Examiner Walsh: Mr. Wolf?

Mr. Wolf: No further questions.

Mr. Stowell: I have one more.

Redirect Examination

By Mr. Stowell:

Q. Mr. Reynolds, did you select the air carrier to be used?

A. Not necessarily so. They go in different directions, different stations, so therefore we used the ones that had the best service.

(Testimony of Clyde E. Reynolds.)

Q. But did you decide, assuming there were two air lines whose routes paralleled at least in part, did you decide which one to use? A. Partly.

Mr. Gaudio: I didn't get the form of that question, Mr. Examiner.

Examiner Walsh: Would you read it back, Mr. Reporter.

(Question read.) [178]

A. Yes.

Mr. Stowell: No further questions.

Recross-Examination

By Mr. Gaudio:

Q. It is your testimony, at any rate, that you assumed the responsibility of selecting the direct carrier—or was that pursuant to the direction of the Board of Directors or other officers of Bay Area?

Mr. Stowell: Mr. Examiner, he is asking for a conclusion as to assuming the responsibility. I think we should limit it to direct facts.

Ask him what he did.

Mr. Gaudio: I got the impression from your question, counsel, that he asumed the responsibility.

I want the record to be definite on that point, that he didn't in fact assume the responsibility.

Isn't that true, Mr. Reynolds?

Mr. Stowell: Mr. Examiner, I object to the form of the question. He is calling for a conclusion of the witness. It seems to me that is a conclusion as to whether he did in fact assume the responsibility.

(Testimony of Clyde E. Reynolds.)

That is a matter to be inferred from all the facts and circumstances.

Examiner Walsh: I think that the witness can answer that question by reason of his experience in operating the service. He should know whether he had the responsibility of [179] being able to select a carrier. He should be able to state what he did, to make a statement on what he actually did, whether it was written or implied authority for him to do so. He may state that.

Mr. Gaudio: Do you understand the question, Mr. Reynolds?

The Witness: Yes, I believe so.

Mr. Gaudio: Will you answer it, please.

The Witness: As an agent I had a letter to the effect that I had authority to sign their bills and to deposit it at the airport, in whichever carrier it was agreed on at these different meetings which line got the bulk, and it was alternated some, and it was usually left up to our discretion how to ship the flowers.

Q. (By Mr. Gaudio): During your period of service, Mr. Reynolds, isn't it a fact that you would have numerous meetings with the officers and the Board of Directors in determining policy for the Bay Area account? A. Yes and no.

Q. Let's take the yes part of it, where you did go.

A. Some of these meetings were supposed to

(Testimony of Clyde E. Reynolds.)

have come up every month, but very few of them ever did.

Q. Let's take the ones that you attended. Wasn't discussion had at those meetings among the members of the Board of Directors as to which carrier should be selected and [180] routed to certain destinations and certain areas to be served?

A. That is right.

Q. And you would follow their instructions?

A. In most cases.

Mr. Gaudio: That is all.

Redirect Examination

By Mr. Stowell:

Q. Mr. Reynolds, what happened when an air carrier, whom you might have been directed to use by the Association, couldn't handle the traffic which you had to offer on a particular day? What did you do?

Mr. Gaudio: Just a moment. There again, Mr. Examiner, we are indulging in speculation.

Mr. Stowell: I will rephrase the question.

Q. (By Mr. Stowell): Were there any days, Mr. Reynolds, when any particular carrier to which you had tendered boxes of flowers could not handle the load? A. There has been.

Q. On that particular occasion can you recall what your course of action was?

A. To find what carrier could handle it.

Q. Mr. Reynolds, before you did that did you

(Testimony of Clyde E. Reynolds.)

call up the president of Bay Area to discover what his attitude [181] was?

A. I don't recall doing that.

Q. But you tendered your boxes and your flower traffic, however, to any carrier which could provide you the necessary capacity to get those flowers out that night; is that correct? A. Yes.

Mr. Stowell: No further questions.

Mr. Gaudio: I should like to carry on this discussion but——

Examiner Walsh: I think I would like to ask a question here to clear up a little point.

Mr. Reynolds, if you had at various times selected air carries for the shipment of your flowers which the Board of Directors, we will say, didn't agree with, and they ordered you to ship you flowers by some other line, would you have any discretion in the matter of selecting a carrier other than their choosing?

The Witness: Absolutely not. They were the boss.

Mr. Gaudio: That is all.

Any more questions, Mr. Stowell?

Mr. Stowell: No more questions.

Examiner Walsh: If not, thank you, Mr. Reynolds. You may be excused, subject to recall, of course.

(Witness excused.) [182]

* * *

LEON D. GREGOIRE

was called as a witness by and on behalf of the Enforcement Attorney, and having been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Stowell:

Q. Will you please give your name to the reporter? A. Leon D. Gregoire.

Q. Mr. Gregoire, are you a member of Bay Area? A. No, I am not.

Q. Were you ever contacted by Mr. Reynolds?

A. No.

Q. Mrs. Decia? [191]

A. No. By whom did you say?

Q. Mrs. Decia.

A. You mean Mrs. Decia from California Floral——

Q. Yes.

A. No. At least not to my knowledge.

Examiner Walsh: Let's find out who Mr. Gregoire is.

Mr. Stowell: I am sorry.

Q. (By Mr. Stowell): Would you please state your occupation, Mr. Gregoire?

A. Wholesale florist, I imagine.

Q. I show you a document on the letterhead of the Consolidated Flower Shipments, Inc., Bay Area, which sets forth certain commodity rates. Have you ever seen this document?

A. To my knowledge, no.

(Testimony of Leon D. Gregoire.)

Q. Mr. Gregoire, do you sell a lot of flowers in the East?

A. Not too many, no. What do you call the East?

Q. I mean east of California.

A. Well, east of California is a lot of area. We do a little, possibly.

Q. Do you ship flowers by air?

A. Just about all of them.

Q. Have you ever shipped via Airborne?

A. Yes, quite a bit. [192]

Q. Do you sell flowers on consignment?

A. No, not as a rule. The only time we ever ship a consignment shipment is if something goes by mistake we return it to the account by consignment shipment. But as a rule our shipments are direct sales.

Q. Are you acquainted with the Stuppy Supply Company? A. Yes.

Q. Who are they?

A. Well, wholesale florists with offices in Kansas City, Dallas, Texas, and St. Joe, Missouri.

Q. Do you sell flowers to Stuppy?

A. Quite a bit, yes.

Q. Consignment? A. No.

Q. How do you ship your flowers to Stuppy by air? A. Which air line, do you mean?

Q. Well, I will leave it up to you to tell me.

A. It depends where space is available. At times

(Testimony of Leon D. Gregoire.)

through TWA, and at other times through Slick.

Q. Do you ever use services of an intermediate firm prior to tendering it to the air carrier?

A. We did in the past, but we don't do it any more now.

Q. Were you using the services of Airborne in June of 1951?

A. I can't say offhand, but I believe I was, into Kansas [193] City and some of those points.

Q. I show you a photostatic copy of a letter, Mr. Gregoire, addressed to you from the Stuppy Supply Company. Would you examine this, please.

Mr. Gaudio: Do you have another copy?

Mr. Stowell: I will show it to you.

The Witness: I don't recall this.

Mr. Stowell: The letter is addressed to you, and I want to know whether you received that letter.

Mr. Gaudio: I thought it was his letter you were referring to.

Mr. Stowell: No, the letter was sent to him.

The Witness: I won't swear that I didn't. I am not sure. I get quite a bit of correspondence.

Mr. Stowell: I will ask the Examiner for a short recess. You could call your office to find out whether you received it.

Mr. Gaudio: Show it to me, Mr. Stowell, and it might save time.

Mr. Stowell: Very well.

Mr. Gaudio, do you have any objection to having this——

(Testimony of Leon D. Gregoire.)

Mr. Gaudio: I appreciate that it is not a document signed by any of the respondents. Neither is it addressed to them, and we have no way of ascertaining the truth or veracity of the statements contained therein, because it is [194] not this witness' document.

But I don't see that it is particularly objectionable from our standpoint.

The Witness: I imagine you can assume we received the letter, if that would have any bearing on it.

Mr. Gaudio: Unless the Examiner has some specific basis upon which he in his opinion wishes to exclude it.

Examiner Walsh: No, I have no particular reason for doing so. It is just one of those hundreds of situations that we run up against every now and then, where it would cost an exorbitant amount of money to bring someone in to give testimony on something like this from a distant point to establish something which may or may not be important in the case.

Mr. Stowell: Mr. Examiner, I am offering this not for the truth of the statements, necessarily, but the fact that he received the letter and that it is a routing request via Bay Area. It seems to me that if Mr. Gregoire will agree that it is authentic, it is certainly admissible for that. It is a routing request, regardless of the accuracy of some of the statements therein, which I am not particularly concerned with at this time.

(Testimony of Leon D. Gregoire.)

Mr. Examiner, I move that this document be marked for identification as EA-74.

Examiner Walsh: The document previously referred to will [195] be marked for identification as Enforcement Attorney's Exhibit No. 74.

(The document above referred to was marked for identification as Enforcement Attorney's Exhibit No. 74.)

Mr. Stowell: At this time I offer the document, Exhibit EA-74 in evidence.

Mr. Gaudio: No objection, Mr. Examiner.

Examiner Walsh: Exhibit EA-74 is received in evidence.

(The document marked as Enforcement Attorney's Exhibit No. 74 was received in evidence.)

Mr. Stowell: I have no further questions.

Examiner Walsh: Any cross-examination, Mr. Gaudio?

Cross-Examination

By Mr. Gaudio:

Q. Mr. Gregoire, I appreciate you say you don't ship too much in the East, at least by air carrier. Is that your testimony? A. That is right.

Q. And is it your testimony also, as I understand it, that you have never routed any of your shipments via Bay Area?

A. That is right.

(Testimony of Leon D. Gregoire.)

Q. In fact, you are not a member of Bay Area?

A. That is right [196]

Q. Have you ever been solicited to become a member of Bay Area?

A. I have been talked to by some of the members in Bay Area.

Q. As another shipper?

A. Just another shipper, suggesting that it might be to my advantage to join them, one thing and another.

Q. You have never joined?

A. I have never joined, because I didn't think it would be advantageous to me.

Mr. Gaudio: This is a photostat. I assume this was taken from an original in someone else's possession?

Mr. Stowell: Yes, that is right.

Mr. Gaudio: At the offices of Mr. Gregoire?

Mr. Stowell: No, I don't believe so. Frankly, I am not aware of the source. It was handed to me quite a long time ago. In fact, it was submitted to our office in Washington about a year ago.

Mr. Gaudio: You don't know by whom?

Mr. Stowell: By the complainant.

Q. (By Mr. Gaudio): I notice in paragraph 2 it reads in part:

"We understand there is a Bayshore Flowers Consolidated"—and the word "shore" is deleted and the word "Area" written over in print. Is that your handwriting? [197] A. No.

(Testimony of Leon D. Gregoire.)

Q. And also on this document there is in script the name John Barulich, Juno 3-1259. Is that in your handwriting, Mr. Gregoire? A. No.

Q. Did you instruct anyone to make those corrections or additions?

A. No, not to my knowledge.

Q. When did you first start to ship by air to the East?

A. In the neighborhood of three years ago.

Q. And I believe your testimony was that that was via Airborne? A. Yes.

Q. Does that mean that you have since gone to some other form of service?

A. Well, for the past, I don't know how long exactly, we have been delivering our own packages to the airport, running our own truck.

Q. For some time now you have run your own truck and delivered to the airport direct?

A. That is right.

Q. And I believe your testimony was that all your shipments to the East are direct sales or direct shipments?

A. Well, I would say the bulk of them. There may be [198] one or two per cent consignment, when we make a mistake.

Q. I assume you have discontinued using Airborne's service. When did that occur?

A. Sometime last year. I am not sure of the exact date.

Q. Would it be about the time of that letter?

(Testimony of Leon D. Gregoire.)

A. I couldn't tell you. I would have to look it up in my records to find out.

Q. How long, if I may ask, have you engaged in operations as a wholesaler of flowers in this area?

A. All my life, I reckon. Dad was in the business quite a few years.

Q. Yours is a sole proprietorship?

A. No, a partnership.

Q. How many others?

A. There are two other partners.

Q. You speak for the firm when you testify here? A. I speak for the firm.

Q. Did the element of the charge alluded to Airborne in this letter have anything to do with your decision to discontinue using their service?

A. I doubt it very much.

Q. In other words, this reads:

"We find that the average overcharge is $1.50 per box on your end for handling. We believe this way in excess of [199] normal rates."

Was that a contributing factor? Was that rate question a contributing fractor in discontinuing their service? A. No.

Q. What particular reason, if any, do you say prompted your discontinuing using Airborne's service?

A. The reason I done it was at the suggestion of most of my accounts.

Q. Beg pardon?

A. My different accounts, I solicited them, and

(Testimony of Leon D. Gregoire.)

they recommended I bring them down direct. They figured it would be a cheaper service. And it has proven slightly cheaper. They don't have that pickup charge to worry about any more.

Mr. Gaudio: That is all. Thank you.

Examiner Walsh: Do you have any questions, Mr. Wolf?

Mr. Wolf: No questions.

Examiner Walsh: Mr. Stowell?

Mr. Stowell: One question.

Redirect Examination

By Mr. Stowell:

Q. Have you ever met Mr. Barulich before?

A. Yes, I did.

Q. How many times have you spoken to him in the past, roughly?

A. I would say about one time. The first time I met him [200] was about the only time I have seen the man.

Q. Did he ever mention to you the idea of joining Bay Area? A. No, he hadn't.

Mr. Stowell: No further questions.

Examiner Walsh: If there are no more questions of Mr. Gregoire, you may be excused. Thank you.

(Witness excused.) [201]

* * *

SIDNEY G. ALEXANDER

was called as a witness for and on behalf of the Enforcement Attorney, and having been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Stowell:

Q. Would you give your name to the reporter, please? A. Sidney G. Alexander.

Q. What is your occupation?

A. Manager California Floral Company.

Q. Are you acquainted with Virginia Decia?

A. I am.

Q. Are you employed by her? A. Yes.

Q. Do you have custody of the records of the California Floral Company? A. I do.

Q. Are you acquainted with the events which led to the organization of the Bay Area Flower Growers & Shippers [212] Association?

A. Yes, sir.

Q. Did you attend the meetings of the Bay Area Flower Growers & Shippers Association?

A. I did.

Q. Did you examine the records of the Bay Area Flower Growers & Shippers Association, which were maintained by Mrs. Decia?

A. I did.

Q. Was Mrs. Decia an official of the Bay Area group? A. She was the Secretary.

Q. Did she have official custody of the records of the Bay Area group? A. That is right.

(Testimony of Sidney G. Alexander.)

Q. I am wondering if you could tell us what were the circumstances which led to organization of the Bay Area group?

Mr. Gaudio: Mr. Examiner, the only testimony we have on this point is that he knows Mrs. Decia, who was the Secretary.

There is no foundation as to whether this man or his firm was a member of Bay Area, or if he is here as a non-member. And if he is a non-member, the question might call for his conclusion, unless there is a further foundation.

Examiner Walsh: Will you develop that further, Mr. Stowell?

Q. (By Mr. Stowell): Did you participate and collaborate with Mrs. Decia in [213] matters pertaining to the Bay Area group?

A. We originated the Bay Area group. We were the originators of it.

Q. Please answer my question as I asked it. Did you collaborate with Mrs. Decia in matters pertaining to the Bay Area group? A. I did.

Q. (By Mr. Gaudio): In what capacity? You are an employee of California Floral?

A. I am the Manager of California Floral Company.

Q. You are the Manager?

A. That is right.

Q. Are you an owner? A. No.

Q. How long have you been Manager?

A. Five years.

(Testimony of Sidney G. Alexander.)

Q. In your capacity as Manager, do you determine policy for the firm, or not? A. I do.

Q. And was it in your capacity as Manager that you collaborated with Mrs. Decia? A. Yes.

Mr. Gaudio: Proceed, Mr. Stowell.

Mr. Stowell: You have no further objection to this witness' [214] testimony?

Mr. Gaudio: Not on voir dire, no.

Q. (By Mr. Stowell): Would you tell us the circumstances which led to the organization of the Bay Area group?

Mr. Gaudio: Just a moment. I believe that question calls for his conclusion. There might be any number of matters of which he has no knowledge.

I think the question, better phrased, would be, what prompted him, as he says, in organizing Bay Area.

Examiner Walsh: Let the witness tell us his experiences in collaboration with Mrs. Decia, as far as he knows from his personal experience.

Let him relate the facts concerning those circumstances, which I assume, Mr. Stowell, may lead to the organization of that Bay Area.

Will you do that, Mr. Alexander?

The Witness: Yes, sir.

Upon the publication of Slick's Tariffs, possibly in 1947, or possibly '48, when they allowed Consolidated Shipments to go to points in the east, we had contacted Highway Transport in Philadelphia

(Testimony of Sidney G. Alexander.)

as our own individual firm, and grouped shipments into that area as the first consolidation. However, as individuals, it was impossible to continue and maintain that rate, at which time Mr. Decia, who was a member of California Floral [215] Company, at that time contacted about 25 shippers and growers in this locality, who signed an original application of membership in Consolidated Flower Shipments—Bay Area, with the help of Douglas Stark of American Airlines.

That is the best I can recall the origination of it, to my knowledge.

Q. (By Mr. Stowell): Mr. Alexander, I show you a copy of what purports to be a letter dated April 4, 1949. Would you examine this, please? Have you ever seen this document before?

A. I have.

Q. In what connection?

Mr. Gaudio: Do you have a copy?

Mr. Stowell: You have seen it already. It is the same document which was exhibited yesterday.

Mr. Gaudio: Do you have an extra copy of that letter, Mr. Stowell? It has come up several times in the hearing.

Examiner Walsh: I think that possibly we should put a label on that particular document.

Can you state for the record exactly what it is?

Mr. Gaudio: Mr. Examiner, that document was produced yesterday. It has no signatures on it. There was testimony that it was initiated by Mr.

(Testimony of Sidney G. Alexander.)

Reynolds and Mrs. Decia, but now this witness has testified that he took an active part in formulating it, passing it around and getting it signed. I would like to [216] state at this time that that document, the original one, is not in our possession, and if it is in the possession of California Floral or Mr. Reynolds or the Complainant, I would like to have it produced.

Examiner Walsh: Do you know where it is, Mr. Stowell?

Mr. Stowell: The original obviously was directed to Air Carriers, and would be in their possession, and only by subpoenaing the letter from Air Carriers could such a document be secured.

If the Respondent insists on it, we will——

Examiner Walsh: Do you know what Air Carriers might have possession of it?

The Witness: I believe the original copy was given to Mr. Barulich, about two years ago.

Mr. Gaudio: If we are going to offer voluntary statements, Mr. Alexander, how long ago did this occur?

The Witness: When Mr. Barulich asked for all of the documents that we had, of Bay Area, at which time he was Executive Secretary and we were no longer members, he was given the complete file that was in our possession.

Mr. Gaudio: Did you give them to him personally?

The Witness: Yes, I did.

(Testimony of Sidney G. Alexander.)

Q. (By Mr. Gaudio): You personally delivered to Mr. Barulich all of the documents formerly in the possession of Mrs. Decia as Secretary [217] of the Association? A. I did.

Q. When did you do that?

A. I think Mr. Barulich could——

Q. I am asking you, Mr. Alexander. You made the statement.

A. One afternoon about a year or a year and a half ago, I would say.

Q. Where?

A. California Floral Company.

Q. At your office? A. That is right.

Q. Did you take a receipt?

A. I believe a letter from Mr. Zappettini.

Q. A letter from Mr. Zappettini?

A. As President of Bay Area, authorizing the delivery of this material to Mr. Barulich.

Q. And did you take a receipt from Mr. Barulich when you delivered to him these various documents and records? A. I did.

Q. Do you have it in your possession?

A. It should be in our files.

Q. Will you produce it at my request?

A. If it is possible to find it.

Q. I am asking you now to produce it, if it is in your [218] possession.

A. If it is in our possession, we will.

Mr. Gaudio: We will reserve the right to call this witness at a later time for that purpose, Mr. Examiner.

(Testimony of Sidney G. Alexander.)

Q. (By Mr. Gaudio): Was this receipt signed by Mr. Barulich in his hand?

A. Mr. Barulich signed it.

Q. In your presence?

A. In my presence.

Mr. Gaudio: You may proceed, Mr. Stowell.

Mr. Stowell: Thank you.

Q. (By Mr. Stowell): Mr. Alexander, will you tell us to whom the originals of this letter were sent?

A. The originals of the letter were not sent, they were delivered personally by Mr. Barulich and Mr. Reynolds.

Q. Do you know to whom they were delivered?

A. I could not tell you unless I saw the names of who signed it.

Mr. Stowell: Mr. Examiner, at this time I move that the document dated April 4, 1949, be marked for identification as EA-318.

Mr. Gaudio: Is that the letter of April 4, 1949?

Mr. Stowell: That is right.

Examiner Walsh: That particular letter will be marked for [219] identification as EA-318, subject to the production of the original of that letter when the party has been ascertained who now has possession of it.

(The document above referred to was marked for identification as Enforcement Attorney's Exhibit No. EA-318.)

Mr. Wolf: Mr. Examiner, could not the un-

(Testimony of Sidney G. Alexander.)

signed copy go in as the form of the original?

Examiner Walsh: It may, if such corrections might be made as reflected by the originals.

Mr. Wolf: I see.

Q. (By Mr. Stowell): Mr. Alexander, do you know who signed the original of this letter?

A. No, I do not.

Q. Mr. Alexander, do you know who the original subscribers were, to Bay Area group?

A. There signatures would be on that original letter. I could not say, off-hand.

Q. Can you tell us what happened after the original of that letter was delivered to certain air carriers?

What happened, as far as Mrs. Decia was concerned?

Mr. Gaudio: I submit again, it calls for his conclusion.

We could have Mrs. Decia testify.

Q. (By Mr. Stowell): [220] Do you personally know what action Mrs. Decia took after that letter was deposited and delivered at the offices of the air lines? [221]

Mr. Gaudio: That is simply a yes or no question.

Examiner Walsh: The witness can state what action she took if he personally observed those actions.

He should be cautioned to give his testimony from that viewpoint.

A. Just that a meeting was called by the various

(Testimony of Sidney G. Alexander.)

signers of this letter, and the representatives of the air lines, in the formation of the organization.

Q. (By Mr. Stowell): Can you tell us what took place at this meeting?

Mr. Gaudio: That calls for his conclusion.

Mr. Stowell: It calls for his observation, Mr. Examiner.

Mr. Gaudio: Mr. Stowell, this man is not a member of Bay Area. There is no foundation laid that the California Floral Company were in the organization, and there is no foundation laid that this man ever attended any meetings, or in what capacity. I very strenuously object to this witness purporting to bind anyone but himself.

Examiner Walsh: Can you develop that a little further, Mr. Stowell?

Q. (By Mr. Stowell): Mr. Alexander, did you attend meetings of the Bay Area group?

A. I did.

Q. All of the meetings? [222]

A. With the possible exception of one or two.

Q. Of your personal knowledge, was the California Floral Company one of the firms who subscribed to the original of the letter which we were discussing? A. Yes.

Mr. Stowell: Is that agreeable to counsel?

Mr. Gaudio: That establishes the fact that the firm was a member, but he is only an employee, Mr. Stowell.

Mr. Examiner, I have not had any indication

(Testimony of Sidney G. Alexander.)

from Mr. Stowell that Mrs. Decia, who it was admitted on the record was the Secretary, and an officer of the corporation, cannot be produced as a witness here.

We are getting everything second-hand from Mr. Alexander.

Mr. Stowell: Is Mrs. Decia available?

The Witness: She is available.

Mr. Stowell: Mr. Examiner, I will withdraw this witness in favor of Mrs. Decia.

Would you please contact Mrs. Decia immediately, Mr. Alexander? Could you have her here this morning?

The Witness: Is there some way we can get her transportation from Redwood City?

Mr. Wolf: Mr. Examiner, could I ask a few questions before the witness leaves the stand?

Mr. Stowell: We will arrange for her transportation.

Mr. Gaudio: I would like to ask this further question. [223]

Mr. Stowell, is it your purpose, then, to call Mrs. Decia for the purpose of the testimony adduced by this witness?

Mr. Stowell: That is correct.

Mr. Gaudio: Is it in order, then, to move that this testimony be stricken from the record?

Examiner Walsh: I think I am going to order the witness to stand by for further testimony, in

(Testimony of Sidney G. Alexander.)

case it might be needed after Mrs. Decia takes the stand.

The Witness: During business hours, I would have to be there if Mrs. Decia leaves.

Would it be possible for her to come up after I get there?

Examiner Walsh: What I mean is that I want you to stand ready to come back, and we will notify you. I do not want to leave the record in this distorted condition, and whether we will recall you or not will depend upon what develops in the testimony given by Mrs. Decia.

If the record needs supplementing to any extent, it might be necessary for us to call you again.

Mr. Gaudio: Mr. Examiner, the reason I ask that is that if this witness' testimony as far as it goes, remains part of the record, I would like to conclude my cross-examination, even to that extent. Otherwise, I would be willing to forego my cross-examination, if his testimony is stricken.

Examiner Walsh: I will defer action.

You may cross-examine the witness on the testimony he has [224] given, yes.

Mr. Gaudio: Very well.

Examiner Walsh: And it probably would be better to do it that way, and you might restate your motion at some further point in the proceeding, to strike, and I will entertain it.

Mr. Gaudio: Very well.

(Testimony of Sidney G. Alexander.)

Cross-Examination

By Mr. Gaudio:

Q. Mr. Alexander, how many specific meetings of the Board of Directors did you attend personally?

A. Nobody ever said anything about the Board of Directors before. This is the original meeting of the members of the Association.

Q. How many of the, let us call them unorganized meetings of the members before incorparation did you attend?

A. I would say every one. How many, I do not know.

Q. Was it a half a dozen? Less than that? More than that?

A. At least a half a dozen.

Q. And you say these meetings all occurred before formal incorporation, or prior to incorporation? A. Prior to incorporation.

Q. Do you know that June 14, 1949, was the date of incorporation?

A. I would not know the date. [225]

Q. If I told you that were so, would you disagree with me? A. No.

Q. So that all of your some six-odd meetings, you attended before that time; is that correct?

A. Yes, sir.

Q. And at this meeting were the members that you say subscribed to this Exhibit EA-318 present?

A. Not all of them.

(Testimony of Sidney G. Alexander.)

Q. How many variously would be present from time to time? A. Possibly 15.

Q. You say 25 subcribed to that letter?

A. I do not know the actual number.

Q. What part did you play in these discussions, Mr. Alexander, on behalf of the firm?

A. On behalf of the firm, Mrs. Decia 90 per cent of the time could not attend, and I was her observer, or acting as secretary for her in her absence.

Q. As a matter of fact, you just sat and listened, did you not, Mr. Alexander? A. Yes, sir.

Q. You did not take an active part in the discussions as such? A. I did at times.

Q. Did you keep any personal notes regarding these meetings [226] on behalf of Mrs. Decia?

A. No, no written notes.

Q. Then you would tell her what transpired?

A. I would.

Q. Then she might or might not act; is that correct?

A. She would discuss it, and if it was for the better interests of the firm, she would act in whatever way she felt accordingly.

Q. How do you know that Mr. Barulich and Mr. Reynolds prepared and circulated the letter of April 4, 1949?

A. I do not believe Mr. Barulich was with the organization at that time.

Q. Then you want to change your former testi-

(Testimony of Sidney G. Alexander.)

mony when you said that Mr. Barulich had a hand in drafting that letter?

A. Mr. Barulich had no hand in drafting the letter. I never stated that.

Q. Did you not testify earlier, Mr. Barulich had a hand in drafting that letter? Correct me if I am wrong.

A. Mr. Reynolds, I never mentioned Mr. Barulich.

Examiner Walsh: He might have. I cannot recall.

Mr. Gaudio: The reporter will pick up his notes at the very outset of the examination, please.

Examiner Walsh: In order to avoid any misunderstanding of it, let the record show that the witness has stated that Mr. Barulich had no hand in preparing this particular letter. That [227] would cure any possible defect that might have occurred earlier in the testimony.

Mr. Gaudio: If he did say it——

Examiner Walsh: I think that will suffice.

Mr. Gaudio: I regret taking up the time, but there has been an allegation in the history of this matter that Mr. Barulich was instrumental for his own personal motives in organizing this association.

That is not the fact, as we will develop throughout the course of the testimony and evidence to be submitted, and if we have taken up some time to attempt to discover whether this witness said that Mr. Barulich did have a part in the beginning, that

(Testimony of Sidney G. Alexander.)

is not the point, and he so stated that in the latter part of his testimony, and I want to be certain that that does not clutter up the record.

Examiner Walsh: I believe the record is clear now on that point.

Q. (By Mr. Gaudio): At the time you attended these meetings, there wasn't any formal organization, was there, Mr. Alexander?

A. No.

Q. So there was not any official secretary, I take it? A. Not to my knowledge.

Q. There was just a group of interested flower shippers and growers in these initial meetings, to organize an [228] association?

A. That is right.

Q. And general discussion prevailed until ultimately the incorporation took place; is that correct?

A. That is correct.

Q. Do you know whether any of the transcribed minutes of those pre-incorporation meetings are available? A. I do not believe so.

Q. Did you keep minutes for Mrs. Decia?

A. As a matter of fact, I could not state whether Mrs. Decia was Secretary of the original group or not.

Q. I see. So, to that extent, you want to qualify your prior testimony, in any event?

A. In my prior testimony I did state Mrs. Decia was Secretary of the Bay Area Consolidated Flower Shippers, but no certain date.

(Testimony of Sidney G. Alexander.)

Q. Are you changing that statement or not?

A. My original answer stands. She was Secretary of the Bay Area group.

Q. As incorporated?

A. Of the Bay Area group. I do not know if there were any original officers.

Q. Were you ever personally appointed Secretary of this group? A. Never. [229]

Q. Did you ever act as Secretary of the group at any of these meetings? A. Never.

Q. When you referred to Slick's Tariffs, which allowed the grouping of shipments, were you referring to this collect distribution facility that was available at one time?

A. Well, actually, that was wrong. That was on our own initiative. It had nothing to do with any other shippers or with any organization group, at all.

Q. But there was, prior to the time Bay Area was incorporated, to your knowledge, a tariff in effect that allowed a system called collect distribution?

Are you familiar with that term?

A. I am familiar with that term, but if it applied to those days or not, I do not know. That is ancient history, now.

Q. At any rate, there was a tariff provision that your firm, of which you are Manager, and some of the officers, thought might be of advantage to them if formed as a group of shippers?

(Testimony of Sidney G. Alexander.)

A. That is right. Not as a group of shippers, no. As a group of consignees.

Q. You mean the receipt of shipments in California? A. No, sir.

Q. Then, when you say, "group of consignees" you are referring to someone else's advantage; is that correct? A. Yes, sir. [230]

Q. You do not propose to speak in their behalf, do you?

A. That is the only one we have been interested in. At that time we were interested in saving the consignees their charges on air freight, which was the reason we attempted that first shipment.

Q. I see what you mean. You mean that you were seeking to obtain the lowest delivery cost to the consignees in the east? A. Yes.

Q. I see. And it was thought that this Association could better effect that purpose; is that right?

A. Yes, sir.

Q. Do you know if there were any other reasons which prompted this group to come together at that time? A. That is the sole purpose.

Mr. Gaudio: Thank you.

Examiner Walsh: Mr. Wolf.

Q. (By Mr. Wolf): Mr. Alexander, you have mentioned collect distribution. What does that mean?

A. To the best of my knowledge, that is where a group of shipments are consolidated through a definite carrier to a locality, and upon receipt on

(Testimony of Sidney G. Alexander.)

the other end, the shipments go completely collect to one agent, and in such a manner they are redistributed to the different outlets in that locality; and by doing so, a cheaper rate is obtained. [231]

Q. I see. And originally, the air lines performed that service; is that correct? A. Yes, sir.

Q. And subsequently the air carriers were not permitted to perform that service?

A. That is right, sir.

Q. At the time this group was organized, the carriers did not have in their tariffs any collect distribution service, did they?

A. To my knowledge, they did not.

Q. That was all prior to the formation of this organization? A. Yes, sir.

Q. Were you asked a question on Direct Examination that after this letter of April 4 was signed up, a meeting was called of the flower shippers?

A. Yes, sir.

Q. Did you attend that first meeting?

A. I did, sir.

Q. And what happened there?

A. The meeting was held at the California Floral Company, in our office. The objects of the Association were explained by a representative of one of the carriers.

I could not say whether it was Slick, United, American, or Flying Tigers, because at different meetings, there would be a [232] different representative there.

(Testimony of Sidney G. Alexander.)

And as to the availability of Mr. Reynolds for carrying it to the airport and consolidating it there—Possibly we had four or five meetings at California Floral Company in the formation of the original group.

Q. I see. And you attended those meetings?

A. I attended every one.

Q. You mentioned, in answer to my last question, that at the first meeting the objectives of the group were explained.

Do you recall what explanation was made?

A. Just in the matter of group shipping.

Mr. Gaudio: Just a moment. By whom? Let us have a more specific foundation on that, counsel.

Examiner Walsh: I think he testified it was either by Slick or the Flying Tigers.

Mr. Gaudio: Are you referring to the air line representative?

Mr. Wolf: Yes.

Mr. Gaudio: Very well.

The Witness: Could I hear that question again?

Examiner Walsh: The reporter will read it back.

(Question read.)

Mr. Wolf: I will withdraw the question, and save time.

Q. (By Mr. Wolf): You testified in answer to my former question that the [233] objectives of the organization were explained. What were those objectives stated to be?

(Testimony of Sidney G. Alexander.)

A. Well, there were two. First, that by the grouping of shipments into any locality, that would ultimately save the consignee charges on delivery; and secondly, by grouping together we could insure receiving a definite insurance rate to cover any damage that might occur en route.

Q. I see. After these original meetings, do you recall any discussion as to whom the members of the group could be?

A. It was open to all shippers and growers alike.

Q. What type of shippers and growers?

A. Flower shippers.

Q. All flower shippers and growers?

A. Yes, sir.

Examiner Walsh: You are speaking of the flower growers and shippers in this area?

The Witness: In this area, yes.

Examiner Walsh: Going back to a question Mr. Wolf asked you about collect distribution, does that term imply a C.O.D. delivery, or does it just refer to the physical aspects of assembling and distributing shipments?

The Witness: It does not apply to the C.O.D.

Examiner Walsh: Does it merely mean that you collect the various shipments at one point, ship them by air carrier, and distribute them to various consignees at the other end? [234]

The Witness: That is right.

Mr. Gaudio: I have a few more questions.

(Testimony of Sidney G. Alexander.)

Q. (By Mr. Gaudio): Mr. Alexander, when you say that the organization was open to all the growers and shippers in this area, do you mean by that, that it was open to all that had subscribed to a letter that was addressed to the carriers; is that what you mean?

A. It was open to all who signed the letter. It was presented to everybody.

Q. It was presented to how many, to your personal knowledge? A. To at least thirty.

A. To at least thirty.

Q. Is it your testimony, Mr. Alexander, that that is the extent and total number of growers and shippers of flowers in the San Francisco Bay area and peninsula?

A. At that time, I would say there were maybe 50.

Q. So at that time, it might represent 50 per cent; is that correct?

A. Well, if they were not contacted with the letter, they were contacted by 'phone.

Q. And of this sum of 50 that you referred to, to your knowledge 25 signed that letter?

A. Twenty-five were interested in an organization.

Q. And when you say that this service was to be made available, you intend, I assume—correct me if I am wrong— [235] that the service was to be made available to those that signed the letter?

A. To those in the organization, yes, sir.

Mr. Gaudio: Thank you.

(Testimony of Sidney G. Alexander.)

Examiner Walsh: Do you have any Redirect, Mr. Stowell?

Mr. Stowell: No.

Examiner Walsh: If there are no more questions of Mr. Alexander, you may be excused, Mr. Alexander, subject to recall. And you indicated a willingness, a few moments ago, to search your file for the purpose of obtaining a receipt for records allegedly delivered to Mr. Barulich.

The Witness: I will do my best, sir.

Examiner Walsh: And will you notify Mr. Stowell with respect to whether or not that receipt can be produced—either way, whether it can, or whether it cannot?

The Witness: I will do so.

(Witness excused.)

Mr. Stowell: At this time I would like to call Mr. Walker.

Whereupon,

CLARENCE WALKER, JR.

was called as a witness for and on behalf of the Enforcement Attorney, and, having been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Stowell: [236]

Q. Will you give your name to the reporter, please? A. Clarence Walker, Jr.

(Testimony of Clarence Walker, Jr.)

Q. What business are you in, Mr. Walker?

A. Wholesale flower shipper.

Q. What is your firm name, if any?

A. Floral Service.

Q. Where are you located?

A. Belmont, California.

Q. Are you acquainted with Mr. John C. Barulich? A. I am.

Q. Where have you seen him?

A. I first met Mr. Barulich at a house party. Secondly, I met him at our office.

Q. Could you tell us the substance of the conversations, if any, at your first meeting with Mr. Barulich?

Mr. Gaudio: When was this house party that you are talking about?

The Witness: The house party could have been two or three years ago. It was possibly three years ago.

It had nothing to do with Bay Area at that time. He was not connected with them at all, then. But that is where I first met him.

Mr. Stowell: Mr. Examiner, the latter part of that answer was volunteered information.

Examiner Walsh: The witness is entitled to explain his [237] answer. He meant to eliminate any possible implication that at the time that he met Mr. Barulich at the house party, that that meeting had anything to do with the Bay Area Association.

Proceed, Mr. Stowell.

(Testimony of Clarence Walker, Jr.)

Q. (By Mr. Stowell): Could you tell us about when your second meeting with Mr. Barulich took place?

A. As far as the date goes, it is pretty hard, but it was after the forming of Bay Area. Mr. Barulich came to our office and asked me if I was interested in Bay Area shipping of cut flowers, at which time I told Mr. Barulich that we were not.

Q. Did he ask you to join the Bay Area group?

A. He told us he would like to have us join the Bay Area group with the others.

Q. Would you say that this took place some time in October of 1949?

A. I would not be certain about the date, but it could have been.

Q. What was your answer?

A. No, we were not interested at that time.

Q. Did Mr. Barulich mention a membership fee?

A. At that time, to my knowledge, there was no membership fee mentioned.

Q. Did Mr. Barulich mention an application form which must be executed for membership in Bay Area? [238] A. No, he did not.

Q. Did he suggest that you ship via Bay Area for a trial period before you made up your mind whether you would join Bay Area?

A. I would not like to state that, because I am not sure, at that time. It has been so long ago. I told him that I was not interested at that time, that

(Testimony of Clarence Walker, Jr.)

we were well satisfied with our present connections, and that maybe a little later, we would be.

I understand that at a later date, Mr. Barulich came to the office to see me. I was not in, and he talked to my auditor and bookkeeper, but I have no recollection of their conversation, because we were not interested in Bay Area.

Before that, if I may add, this letter was brought to me by Mr. Al Decia. It was a blank form, and we were asked to sign it, and that it would mean nothing, just that we were trying to form a new organization. And when I put my name on the top line, I was the first one to sign it, and I have never used it, and never heard another word about it.

Q. Did Mr. Barulich mention that your name was on this letter, when he spoke to you?

A. No, he did not mention that my name was on the letter, to my knowledge, at that time.

Q. Have you ever shipped via Bay Area?

A. No, we have not. [239]

Q. Have you received requests from your consignees to ship via Bay Area?

A. Yes, we have received requests, several of them.

Q. Can you recall one in particular?

A. Mr. Cereghino——

Mr. Gaudio: Just a moment. If that request was in writing, it would refer to a written document. I am assuming it was from someone in the east.

(Testimony of Clarence Walker, Jr.)

The Witness: Yes.

Mr. Stowell: Mr. Examiner, I wish he would be permitted to continue. I will have that particular document identified that he has reference to.

The Witness: We had a request from Mr. Cereghino, who represents us in New York, on some of our colored merchandise, to ship through Bay Area. At the same time, we have had letters from various people from various markets, requesting Bay Area, which we have never paid any attention to, but just go along and ship the way we were.

However, at one time, we received a letter, or I should say a form, from an association in New York, requesting all the shipments that go in there to be forwarded via Bay Area to a warehouse in New York for redistributing.

This document we looked at and laughed about, and it was thrown away. But it was from a New York organization.

Mr. Gaudio: Just a moment. Mr. Examiner, I understood the [240] witness to be testifying to the contents of a letter which was to be produced. Now it develops that that letter is not available.

Mr. Stowell: That letter will be made available shortly, as soon as the witness completes his answer.

Mr. Gaudio: Are you referring to the one that was destroyed?

Mr. Stowell: He is referring to other requests from consignees.

The Witness: Just other requests.

(Testimony of Clarence Walker, Jr.)

Mr. Gaudio: Well, I ask that the answer be stricken, Mr. Examiner, on a hearsay rule.

"Did you receive requests?" "Yes."—period. And if he is going to testify to the contents of these letters, I want them produced.

Examiner Walsh: I will strike the part with respect to the specific letter, and I will allow the part of the answer to stand, that he has received other requests. To that extent the objection is sustained.

Mr. Gaudio: Thank you, Mr. Examiner.

Q. (By Mr. Stowell): Can you recall the names of the firms from whom you received these requests?

A. I would have to look through the records and wires that we have received, requesting it. Offhand, it is pretty [241] hard to state for sure.

I can say that the markets that we have had requests from, like Detroit, New York, we have had various types of requests from there.

Q. Would you produce at this hearing your records containing such requests?

A. I would be very glad to.

Q. Who is Edward Cereghino?

A. Edward Cereghino is a salesman for various West Coast florists. He handles a certain line of Lorac products that we produce.

Q. What arrangements do you have with Mr. Cereghino for the shipments and sale of your merchandise?

(Testimony of Clarence Walker, Jr.)

A. He handles, as I say, our products of the Lorac Company—that is, painted eucalyptus and colored grasses. He sells those through the east and middle west on a commission basis.

Q. When you ship to Mr. Cereghino, do you ship to him on consignment?

A. No, we do not.

Q. Does he go out and secure orders?

A. He secures orders, and we bill him, and they are shipped to the various accounts that he has sent the orders in for.

Q. And Mr. Cereghino secures the [242] collection?

A. He collects, and then mails us his check, and at the same time he tells us the customers' requests as to the way of shipping. Most of our items are shipped by truck, until about the first two weeks in December, when our item is a Christmas item, and at that time we are requested to ship by air or rail.

Q. What are your instructions to Mr. Cereghino on the sale of your merchandise? And by that, I mean, what kind of sales material do you give him, or advertising material?

A. We do not give him any advertising material other than the prices of our products.

Q. Have you ever suggested to him that he mention Bay Area to your customers?

A. No.

Q. I show you a copy of a letter addressed to you. Would you examine it? It has no date on it,

(Testimony of Clarence Walker, Jr.)

and it is from Edward Cereghino, of 45 West 28th Street, New York.

Examiner Walsh: Did you say whether that is a copy or the original?

Mr. Stowell: Have you the original of this letter in your possession?

The Witness: The original is in our file some place, that is for sure. I remember that letter, very, very plainly.

Q. (By Mr. Stowell): Could you produce the original?

A. I will do the best I can to find it, but under oath, [243] that is the same letter that was sent to me.

Q. Can you place the time of this letter, approximately?

A. It was last year, during the acacia glut season, I can assure you of that.

Mr. Gaudio: I do not want to seem over-technical, but there are so many documents that if we can have the benefit of an original in this proceeding, I would certainly like to have it.

The Witness: I will certainly do all I can to get it for you, sir.

Examiner Walsh: You are offering that for identification?

Mr. Stowell: Yes. At this time I move that the document referred to be marked for identification as EA-319.

Examiner Walsh: That will be marked as En-

(Testimony of Clarence Walker, Jr.)
forcement Attorney's Exhibit 319, subject to the same limitation that I stated a while ago, that if at all possible, the original be produced to substitute in lieu of it.

(The document above referred to was marked for identification as Enforcement Attorney's Exhibit No. 319.)

Q. (By Mr. Stowell): Mr. Walker, I show you what purports to be a rate memorandum from Consolidated Flower Shipments, Inc., Bay Area. Would you please examine it.

Have you ever seen that document before? [244]

A. To my knowledge, no. We have received documents from air lines. They are just glanced at and thrown away. As I say, we are very satisfied with our own connections, now.

Mr. Gaudio: I ask that the answer be stricken, except that the answer is no.

Examiner Walsh: The answer is a flat "no"?

The Witness: That is right, no.

Mr. Stowell: I have no further questions.

Examiner Walsh: Mr. Gaudio, you may cross-examine.

Cross-Examination

By Mr. Gaudio:

Q. Mr. Walker, are you a proprietor or owner of the Floral Service, in Belmont?

A. Partner.

Q. How many partners are there?

(Testimony of Clarence Walker, Jr.)

A. My mother.

Q. A family partnership?

A. That is right.

Q. Would you say that your second meeting with Mr. Barulich was after September of 1949?

A. It is awfully hard to say on the date, it is so long ago. And it was nothing that I was interested in. If I was interested, I would have remembered it. It was more or less, he just came in and we talked.

Q. Was he alone? [245]

A. I may be wrong, but I think there was someone else with him. I am not sure. I think Mr. Bonaccorsi was with him. Really, I do not exactly remember.

Q. And did they tell you at the time that Mr. Barulich had been appointed either a traffic manager or executive secretary?

A. That he was connected with it. I do not know which one it was, but he was connected with Bay Area.

Q. Who opened the conversation, if you remember, Mr. Bonaccorsi or Mr. Barulich?

A. I could not say for sure.

Q. Would you say that their primary purpose in their visit, as discussed with you in the conversation, was the question of whether you either were or should be a member of Bay Area?

A. They were more or less asking me if I would like to become a member of Bay Area.

(Testimony of Clarence Walker, Jr.)

Q. Prior to that time, had you shipped any single shipment via Bay Area? A. No, sir.

Q. Did you partake in any of the preliminary organization meetings?

A. No meetings such as I heard of before, but I have been invited to some of the American Airlines meetings, discussing shipping.

Q. And at these meetings with the air lines, were other [246] floral shippers present?

A. Yes, there were.

Q. Do you recall ever seeing Mr. Zappettini there?

A. I have seen him at meetings, yes.

Q. And Mr. Bonaccorsi?

A. Yes, almost all of them.

Q. Do you ever remember Mr. Enoch at any of them?

A. Either Mr. Enoch or his partner, his associate, Mr. Pierce.

Q. Mr. Nuckton, for example? Do you know Mr. Nuckton? A. Yes, I know him.

Q. Was he also there?

A. I only met him at one meeting. It was not with the American Airlines.

Q. How many of these meetings did you personally attend? A. Three.

Q. Three of them?

A. They were held at the Benjamin Franklin Hotel.

Q. In San Mateo? A. That is right.

(Testimony of Clarence Walker, Jr.)

Q. Do you know how soon thereafter Bay Area was completely organized—that is, finally incorporated? A. No, sir.

Q. What was your last participation at these meetings?

A. It was in connection with shipping flowers with American [247] Airlines, and I was invited. I was asked to attend, and I did, and it really meant nothing.

Q. As a matter of fact, as you previously stated, you had signed that letter that was sent to the air lines?

A. I had signed that for Mr. Al Decia, yes, but at that time there was no Bay Area.

Q. I know that. And in turn the air lines, in holding their meetings, I assume, sent you an informal request to be present at some of these organization meetings?

A. Mr. Stark 'phoned me.

Q. And you attended them? A. Yes, sir.

Q. And you discussed the purposes and intentions of this organization with some of the other shippers and representatives of the air lines?

A. I did not discuss anything, myself.

Q. Did you, at any of these meetings, retract your signature, or your having subscribed to this letter? A. No, not at any stage.

Q. Did you at any of the meetings?

A. No, I did not.

Q. So, insofar as that group is concerned, your

(Testimony of Clarence Walker, Jr.)

name had appeared on this letter, and to their knowledge had never been withdrawn, as a party interested in the organization of Bay Area? [248]

A. That is right.

Mr. Gaudio: That is all. Thank you.

Examiner Walsh: Mr. Wolf?

Mr. Wolf: No questions.

Examiner Walsh: Any Redirect?

Mr. Stowell: No.

Examiner Walsh: You may be excused. Thank you.

Mr. Walker, I perhaps should call your attention to the fact that you have agreed to produce certain originals of documents, presumably letters from consignees, requesting that you forward your shipments via Bay Area. Will you produce as many of those as you can find?

Mr. Stowell: Mr. Examiner, the Cereghino letter, as well as any requests from other consignees.

The Witness: Yes. Do you want me to mail those, or send those up here?

Mr. Stowell: Have those brought to me tomorrow, if possible.

The Witness: I will.

(Witness excused.) [249]

* * *

LENO PIAZZA, JR.

was called as a witness for and on behalf of the Enforcement [250] Attorney, and, having been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Stowell:

Q. Will you give your full name to the reporter, please? A. Leno Piazza, Jr.

Q. What business are you engaged in?

A. Wholesale florist.

Q. Where? A. Oakland.

Q. What is the firm name?

A. L. Piazza, Wholesale Florist.

Q. What is the exact connection between you and the firm name that you just mentioned?

A. Partner.

Q. Who is Leno Piazza?

A. That is my father.

Q. And what is his connection with the firm?

A. Owner.

Q. Have you ever shipped via Bay Area?

A. Yes.

Q. About when?

A. I believe in 1949, somewhere in there.

Q. Did you bring with you certain flower manifests, covering your shipments over Bay [251] Area? A. Yes, I did.

Q. Mr. Piazza, you have been sitting in this room and listening to the discussion about a letter dated April 4, which was identified as EA-318. Would

(Testimony of Leno Piazza, Jr.)

you examine it, please? Did you sign the original of that letter?

A. If this is the original letter that they started with, we signed the original.

Q. When you say "we," who do you mean?

A. Either my father or I signed it.

Mr. Gaudio: Just a moment. Did you sign it?

The Witness: I really do not recall.

Mr. Gaudio: Do you know whether your father in fact signed it?

The Witness: One of us signed it.

Mr. Gaudio: Very well.

Examiner Walsh: Let the witness read the contents of that letter thoroughly, so that he might be able to state whether that is the same writing that was shown to him, and the same as the writing which he signed.

The Witness: As far as I know, this is the same.

Q. (By Mr. Stowell): Did you attend any meetings of the Bay Area group after this letter was signed?

A. I do not believe we did, either of us. I know I did not. [252]

Q. How about your father?

A. I doubt it very much.

Q. Were you or your father, if you know, ever requested to make any payments to the Bay Area group, for any purpose whatsoever?

A. I am not sure of that, I do not really recall whether we were or not.

(Testimony of Leno Piazza, Jr.)

Q. Can you tell me about when your firm started to ship via Bay Area?

A. Around August, through the chrysanthemum season.

Mr. Gaudio: Of what year?

The Witness: That would be 1949.

Mr. Gaudio: August to October of 1949?

The Witness: It would be that period, possibly a little sooner.

Q. (By Mr. Stowell): At this time, Mr. Piazza, I show you American Airlines flower manifest, dated September 2, 1949. There were two for September 2, two for September 5, two for September 6, one for September 7, one for September 8, three for September 9, which indicate Leno Piazza as consignor, and which indicate Reynolds Brothers in the corner, as a notation.

Mr. Piazza, I ask you whether these are flower manifests representing shipments which your firm made via the Bay Area Consolidation? [253]

A. They are.

Q. Have you, or has your father, or your firm, ever in fact made any payments to the Bay Area group? A. To my knowledge, we have not.

Q. Is it not a fact that a careful check was made of your accounting records, at my request, for the period June, 1949, to January, 1951, and there was no evidence of any such payments, or other disbursements being made, to the Bay Area group?

A. That is right.

(Testimony of Leno Piazza, Jr.)

Mr. Gaudio: What date was that, the closing date?

Mr. Stowell: January, 1950. I am sorry.

That was from July, 1949, to January, 1950.

The Witness: That is right.

Q. (By Mr. Stowell): Can you tell us about when you stopped shipping via the Bay Area group?

A. I think it was around—it was a short time that we did business with them, or shipped anything through them.

Q. Have you ever met Mr. Barulich?

A. I do not recall meeting him. I have heard the name.

Mr. Stowell: I have no further questions of this witness.

Examiner Walsh: Cross-examination, Mr. Gaudio.

Cross-Examination

By Mr. Gaudio:

Q. Mr. Piazza, did you know Mr. Reynolds before you [254] shipped via Bay Area?

A. No. I say, no. I do not recall knowing him. The name was quite talked about at the beginning of Bay Area.

Q. Did your firm use the Reynolds Transfer and Pickup Service, before September of 1949?

A. I do not believe so.

Q. Who presented this letter that you signed, April 4, the letter that you identified and read?

(Testimony of Léno Piazza, Jr.)

A. It is so far back that I really do not exactly remember who it was.

Q. Was it Mrs. Decia?

A. No. Mrs. Decia has not been to our store.

Q. Has not been?

A. Not been to our place.

Q. Did you meet Mr. Reynolds before you sent your first shipment via Bay Area?

A. I believe Mr. Reynolds could have been over there once, at the very most, probably contacted my father.

Q. Do you believe that was when he might have obtained your father's signature to this letter?

A. I could not say for sure.

Q. At the time that letter was presented to your firm, did you indulge in any discussions with your father regarding membership in this proposed association?

A. Well, we did discuss—we discussed only the signing [255] of the original letter.

Q. That letter does not mention anything about what the responsibilities would be of the members, if the organization was formed, does it?

A. No. It was presented, and we could sign it if we were interested, and it did not mean anything as far as legal, or anything else, that we would be tied down to.

Q. Yes. And it does not mention anything about the payment of dues, or any other assessments to the organization to be formed, does it?

(Testimony of Leno Piazza, Jr.)

A. No.

Q. Has a demand for the payment of dues ever been made upon your firm? A. To me, no.

Q. But I mean to your firm?

A. I could not say. I think that was discussed with my father.

Q. The matter of dues might have been discussed with your father? A. Yes.

Q. And is it not a fact that your firm, when the question of dues first arose in connection with Bay Area, decided not to pay dues, and thereby discontinued its activity as a member of Bay Area?

Is not that true? [256]

A. The reason for discontinuing had nothing to do with dues.

Q. When did you decide to discontinue?

A. At that particular time we were rather disgusted with American Airlines and their tactics, and we were quite satisfied with the other carrier who was handling our merchandise, so we thought we would drop the whole thing and discontinue then.

Q. And would it be purely coincidental that that decision was made at about the time that demand for the payment of dues was made?

A. That was just about the time, and then we dropped them.

Q. Have you ever attended any of the meetings of Bay Area since its incorporation?

A. No, I have not.

(Testimony of Leno Piazza, Jr.)

Q. Did you attend any of the pre-incorporation meetings? A. No.

Q. Did your father?

A. Possibly. I could not say for sure. I doubt it.

Q. At any rate, your firm went on record as favoring the organization of this group in the first instance, by signing that letter?

A. I would not say it was favoring. It was considering it.

Q. Did you ever notify the group that you were no longer [257] considering it?

A. I believe my father did.

Q. And when did that take place, at the time the dues were demanded?

A. No, at the time we were having the argument with American Airlines. I mean, we were rather disgusted, as I said before, and we thought we would rather forget about the whole thing.

Q. Did Mr. Reynolds—I believe the record might show this—handle all of these pickups that were shown by the manifests shown you?

A. Did he handle them, Reynolds, Brothers?

Q. Yes. A. Yes.

Q. Did you ever have any indication from Mr. Reynolds that he would no longer go to Oakland to make pickups? A. I do not recall.

Q. I believe, if my notes are correct here, your last shipment was on September 9; is that right?

A. September 9, I believe, 1949.

Q. So you shipped for about one week; is that right? A. A week or two.

(Testimony of Leno Piazza, Jr.)

Q. From the second to the ninth of September.

Did you ever receive—did Mr. Reynolds ever call at your place of business after the 9th? [258]

A. No, not after that. I was thinking, he picked up there, himself, one day.

Q. After the 9th?

A. No, before the 9th, during that week.

Q. But do you know whether Reynolds Brothers Transfer Company ever called at your place of business after September 9?

A. No. After we dropped them, he did not come over any more.

Q. Is it your testimony that this dropping of either membership or use of the American Airlines service, occurred about September 9, 1949?

A. That is right.

Mr. Gaudio: I think that is all.

Examiner Walsh: Mr. Wolf?

Mr. Wolf: Yes, I have a few questions.

Q. (By Mr. Wolf): Mr. Piazza, did you ever sign any bylaws of Bay Area?

A. What do you mean?

Q. Did you ever sign any bylaws?

A. I do not recall.

Q. The only thing you ever signed that would pertain to the Consolidated Flowers group was this one letter that either you or your father signed; is that correct? A. Yes.

Q. Did you personally ever attend any meetings of the [259] group? A. No.

(Testimony of Leno Piazza, Jr.)

Q. What is your best recollection as to whether or not your father did?

A. We received different notices, and there was talk that he would go, but as far as anything definite, that he did attend, I could not say.

Q. You say you received notices of meetings?

A. I have received 'phone calls that there were meetings that we should attend.

Q. Do you know from whom those 'phone calls were? A. I do not recall definitely.

In other words, after we had no connection with it, we just did not pay much attention to the calls, or anything in writing that did come to us.

Q. Did you ever receive one of these (indicating)? A. I do not recall seeing this.

Examiner Walsh: That is a rate memorandum, I believe.

Mr. Gaudio: What was his answer to the question?

Mr. Wolf: No.

Q. (By Mr. Wolf): After September 9, when you stopped shipping via Bay Area, did you receive any calls from any official of Bay Area requesting that you continue shipping by them, do you recall?

A. I do not recall. [260]

Q. Do you recall any requests from any official of Bay Area after September 9, 1949, that you continue in the organization?

A. I vaguely remember Mr. Bonaccorsi coming to the store, now that you mention it. He was over

(Testimony of Leno Piazza, Jr.)

talking with my father, and in the conversation they got onto Bay Area Flower Shipping. What was said, or anything about it, I did not pay much attention to it, but there was some discussion as to this Bay Area business.

Q. Do you recall if the discussion involved the question of whether you were in or out?

A. I do not think it went into that too much.

Mr. Wolf: That is all. Thank you.

Examiner Walsh: Is there any redirect, Mr. Stowell?

Redirect Examination

By Mr. Stowell:

Q. Mr. Piazza, do you know whether your father ever filed with the Civil Aeronautics Board either a formal or informal complaint respecting the practices of American Airlines and Bay Area, so far as it affected your business or your father's business?

Mr. Gaudio: Just a moment. I do not know what counsel intends by that question. If there are two separate complaint matters pending, as there might have been at the time, it would be incompetent, irrelevant and immaterial as pertaining to [261] American Airlines. I object to the question on that ground.

Mr. Stowell: Mr. Examiner, I am trying to explore a little more, the reasons for their withdrawal from Bay Area, and I am not interested in the American Airlines phase of it.

(Testimony of Leno Piazza, Jr.)

Mr. Gaudio: That question is for the Examiner to determine on the testimony.

Mr. Stowell: I am making the point to the Examiner that this is a preliminary question, and that is my purpose.

Examiner Walsh: Let the witness give the testimony from the standpoint of the Bay Area services, and if anything incidental is needed to further that explanation, then he might give it in his own words.

Mr. Gaudio: Will you reframe your question with reference to Bay Area?

Mr. Stowell: I prefer to have it answered as it is.

Examiner Walsh: Then lay a little bit more of a foundation for it.

Q. (By Mr. Stowell): Did you find that the services of Bay Area were unsatisfactory?

A. Yes.

Q. Do you know whether your father ever submitted a letter to the Board respecting such unsatisfactory service of Bay Area, in connection with certain air carriers?

Mr. Gaudio: Just a moment. Here we go [262] again.

I will let the question and answer stand as to Bay Area, but not as to any direct carriers operating service. I will object to that.

We are not here determining the operations of the direct carriers.

Mr. Stowell: Let me put it this way:

Q. (By Mr. Stowell): Have you ever written

(Testimony of Leno Piazza, Jr.)

any correspondence to the Civil Aeronautics Board?

A. Yes.

Q. What did it concern?

A. It concerned American Airlines and a definite contradiction between the air lines and Bay Area, and one thing and another, that rather provoked us into writing that particular letter.

Examiner Walsh: Was that respecting liabilities for shipments? Did it concern loss or damage?

The Witness: No, it had nothing to do with damages to shipments. It was handling an allotment of shipments.

Q. (By Mr. Stowell): Did you discuss in that letter the problem of allocation of space via Bay Area for your shipments?

Mr. Gaudio: Just a moment. I will object to that question as calling for the conclusion of the witness, as to whether Bay Area has any authority to allocate space. [263]

Mr. Stowell: Would you discuss more in detail——

Examiner Walsh: Let us read that question back.

(Question read.)

Examiner Walsh: It is a leading question. Be a little more specific, Mr. Stowell.

Q. (By Mr. Stowell): Will you tell us more in detail the contents of that letter?

Mr. Gaudio: Just a moment. I will object on the same grounds, Mr. Examiner. First of all, it is

(Testimony of Leno Piazza, Jr.)

hearsay as to these Respondents, and we should produce the letter if it is available.

Mr. Stowell: The letter is not available.

Mr. Gaudio: The witness testified that he addressed a letter to the Board.

Mr. Stowell: It is not available in San Francisco.

Mr. Gaudio: Is it available in the office of the Enforcement Attorney?

Mr. Stowell: It is.

Mr. Gaudio: May we have a copy?

Mr. Stowell: You may.

Examiner Walsh: Perhaps we can get a stipulation on that. The Enforcement Attorney will write for a copy.

Mr. Gaudio: And upon such being furnished, it may become a part of the record. [264]

Q. (By Mr. Stowell): Could you tell us why you regarded the service of Bay Area as unsatisfactory?

A. Our shipments were not going through too satisfactorily, and, as I said, this allocation business came up with American Airlines, and there was a definite contradiction between what Reynolds Brothers was telling us, and what American was telling us, in regard to allocation.

One said we would be allocated so many boxes, and that Reynolds, or Bay Area, were allowed so much to reallocate amongst all the shippers. And when I called Reynolds and asked him if that was

(Testimony of Leno Piazza, Jr.)

true, he said, "We know nothing of allocation. We tell them how many boxes we have, and they take them."

So it was working out in an unsatisfactory way for us, because we had gotten three different stories, and our boxes were not going out, so we just got disgusted and dropped them.

Q. What was your attitude at the time you withdrew, about the treatment by Bay Area of your shipments?

Mr. Gaudio: I do not understand the question as to what his attitude was. He either accepted their service, or he rejected it and discontinued using it.

Mr. Stowell: I am going to find out the motive—trying to find out the motive for your withdrawal from the Bay Area service.

Examiner Walsh: We do not have anything on the record, Mr. Stowell, which would indicate whether the dissatisfaction was [265] with the services of Bay Area or American Airlines, and I do not see that there is proper premise for your last question.

Unless the witness can state definitely that there was something about the service of Bay Area, himself, that he found unsatisfactory, I do not see where any evidence that we will get into the record from this witness is going to be of any probative value.

Q. (By Mr. Stowell): You have testified that you found the Bay Area service unsatisfactory?

(Testimony of Leno Piazza, Jr.)

A. Yes.

Q. Could you tell us in what respect?

Mr. Gaudio: Just a moment, Mr. Piazza. I believe the question has been asked and answered.

Examiner Walsh: I think it has. I think your answer was with respect to this allocation of space?

The Witness: That is correct.

Examiner Walsh: You received certain information along one line, from Mr. Reynolds, and you received opposite information from American Airlines?

The Witness: That is correct.

Examiner Walsh: Would that be the extent of your dissatisfaction with the services?

The Witness: That provoked it. At the same time our shipments were not going through in a satisfactory manner, and that [266] just added a little more to it. Actually, Reynolds Brothers was not the main point that we were after at that time, as much as it was American Airlines' unorthodox tactics.

Mr. Gaudio: In short, your entire concern was because of the service of the underlying carrier, American Airlines?

The Witness: That was the main gripe at that time. Of course, one went in hand with the other, the way it seemed to us at that particular time. We were dissatisfied with both of them.

Mr. Stowell: I have no further questions.

Examiner Walsh: Mr. Wolf?

Mr. Wolf: I have on question, Mr. Piazza.

(Testimony of Leno Piazza, Jr.)

Recross-Examination

By Mr. Wolf:

Q. Do you know if Bay Area discriminated against you in the allotment of space on planes?

Mr. Gaudio: Just a moment. I will object to the question. It is irrelevant, incompetent and immaterial, not bounded within the issues of this matter. It assumes a fact not in evidence, that Bay Area has any control over the allocation of space.

Examiner Walsh: I will sustain the objection.

Q. (By Mr. Wolf): Is it your understanding, Mr. Piazza, that Bay Area would reserve space for the shipment each day on some air line?

A. Yes. [267]

Mr. Gaudio: Just a moment. I object to that as calling for the conclusion of the witness, no foundation laid as to with whom such understanding might have been had, under what circumstances.

Examiner Walsh: Will you lay a little more foundation, Mr. Wolf?

Mr. Wolf: Yes.

Q. (By Mr. Wolf): Did Mr. Reynolds tell you at any time that Bay Area reserved its space daily on planes for the consolidated shipment of flowers?

Mr. Gaudio: Just a moment. Mr. Examiner, that has been asked and answered, and he said in so many words, "I have no control"——

Mr. Wolf: This is cross-examination, Mr. Examiner.

(Testimony of Leno Piazza, Jr.)

Examiner Walsh: I will allow the witness to answer.

Mr. Wolf: Will you read the question, please?

(Question read.)

A. In the conversation that I had with him, it was not phrased that way. He said, as I said before, that they called up and received estimates, and they in turn notified the air lines what their boxes would be for that day, that they knew nothing of allocation as far as we were concerned.

Q. Do you know if, when the boxes of flowers from the various shippers arrived at the airport to be put into the space [268] that Bay Area had taken for the day, your boxes received equal treatment with the boxes of other shippers?

A. I cannot——

Mr. Gaudio: I submit he could not answer that question unless he was present.

Mr. Wolf: I asked if he knows.

Examiner Walsh: To the best of your knowledge.

A. I could not say that it did or did not.

Q. (By Mr. Wolf): You do not know?

A. No.

Mr. Wolf: That is all. Thank you.

Examiner Walsh: Do you have another question, Mr. Gaudio?

Q. (By Mr. Gaudio): When you say that your shipments were not getting through, do you mean these particular shipments that you have shown here by these manifests?

(Testimony of Leno Piazza, Jr.)

A. I believe they are included in that.

Q. And in each instance it was a question of space allocation; is that right?

A. I think so.

Q. Have you had any trouble since?

A. Periodically.

Q. But not with Bay Area's service?

A. No. [269]

Q. Do you know via what carrier, that is, what air line? A. What air line?

Q. Since September 9, 1949——

A. Have I had trouble with any air line? Will you repeat the question?

Q. Which air line, if you wish to state for the record, since September 9, 1949, have you now found to be satisfactory?

A. Oh, I have found United very satisfactory in most cases.

Q. Have you ever used Slick?

A. Occasionally.

Q. Flying Tigers? A. Very seldom.

Q. And have you since used American, since September of 1949? A. Yes, we have.

Q. How do you find their service?

A. It has improved.

Q. Has this question of your space allocation, as you refer to it, improved since September of 1949, insofar as your shipments are concerned?

A. There has not been any mention of allocation to me since that time.

(Testimony of Leno Piazza, Jr.)

Q. And there has not been any difficulty, in so far as your shipments are concerned? [270]

A. Oh, there has been difficulty.

Q. No difficulty? A. I said there has.

Q. But not through Bay Area? A. No.

Mr. Gaudio: That is all.

Mr. Stowell: No further questions.

Examiner Walsh: Do you have any more questions, Mr. Wolf?

Mr. Wolf: No.

Examiner Walsh: You may be excused. Thank you.

(Witness excused.) [271]

* * *

WALTER GILLO

was called as a witness for and on behalf of the Enforcement Attorney, and, having been duly sworn, was examined and testified as follows: [272]

Direct Examination

By Mr. Stowell:

Q. Will you give your name to the reporter, please? A. Walter Gillo.

Q. What occupation are you engaged in, Mr. Gillo.

A. Grower and shipper, and wholesale florist.

Q. What business name do you use, Mr. Gillo?

A. Western Wholesale Florists.

Q. Is that a corporation? A. No, it is not.

(Testimony of Walter Gillo.)

Q. Is it a partnership? A. Yes.

Q. Are you now a member of Consolidated Flower Shipments, Inc., Bay Area?

A. Yes, I am.

Q. Do you ship via Airborne? A. Yes.

Q. On what occasions do you ship via Airborne?

A. I would say about 20 per cent of our shipments go out by Airborne.

Q. Do you ship via Airborne on your own initiative, or do you only do so when a customer requests that particular service?

A. If our customer requests it, we ship by Airborne.

Q. Do you receive instructions from your consignee to ship via Bay Area?

A. Quite a few times. [273]

Q. Do you ship to Charles Fudderman of New York City? A. Yes, I do.

Q. Do you ship to Detroit Flower Growers?

A. Yes.

Q. Can you recall from memory the names of the customers who have specifically requested the Bay Area service during a recent period?

A. There has been quite a few of them, from time to time, but I really could not name them off.

Q. Can you tell me if Fudderman has requested the Bay Area service? A. I do not recall.

Q. The Detroit Flower Growers?

A. Yes, they have.

Q. Is Detroit Flower Growers a consignee who receives shipments from you on consignment?

(Testimony of Walter Gillo.)

A. Not all shipments.

Q. On any of them, consignment shipments?

A. Not too many. I would say from 2 to 4 boxes a week.

Q. Are consignment shipments made to the Detroit Flower Growers? A. Yes.

Q. Has he indicated that he would like for you to ship via Bay Area, even with respect to the consignment shipments? A. Yes, he has. [274]

Q. Can you think of the names of any other consignment consignees?

By "consignment consignees" I mean persons who have shipments from you on consignment.

Can you think of the names of any other consignment consignees who have asked you to ship via Bay Area?

A. Well, yes, there is one in St. Louis.

You mean to ship by Airborne?

Q. No, via Bay Area.

A. No, I do not recall of any of them asking me to do that.

Q. You mean, then, that as far as you recall, only the Detroit Flower Growers as a consignment consignee, has requested you to use Bay Area?

A. That is right.

Q. And what type of consignees were the others who requested you to use Bay Area? Were they outright sales by you?

A. Yes, they were outright sales.

Q. Could you describe for us the mechanism of

(Testimony of Walter Gillo.)

a consignment sale as between yourself and the ultimate purchasers?

A. I could not very well explain that.

Q. Let me try to ask you specific questions.

What induces you to ship flowers to the eastern markets on consignment instead of selling them outright?

A. A lot of wholesalers would rather receive stuff on consignment. [275] I do not know what the object of that is. That is why we do not do too much consignment business. We only have one account there that we ship on consignment, and that is the Detroit Flower Growers.

Q. Mr. Gillo, in order to send flowers on consignment to the east coast, do you just pick out the names at random from a directory, or do you know that a certain person will accept your shipments on consignment?

Mr. Gaudio: Mr. Stowell, if we follow his testimony correctly, he has one consignment receiver. Is that right?

The Witness: That is right.

Mr. Gaudio: And he is not on the east coast.

Mr. Stowell: Well, he is east of California.

Mr. Gaudio: Where is your consignment receiver located?

The Witness: Detroit, Michigan.

Mr. Gaudio: That is the only consignment receiver that you have?

The Witness: On Bay Area shipments.

(Testimony of Walter Gillo.)

Mr. Stowell: I would prefer to continue this examination.

Examiner Walsh: As I understood Mr. Gillo, so far as he has indicated, he has only one consignment customer.

Mr. Stowell: That is correct.

The Witness: No, I have not. I have two other ones, but I do not ship by air.

Examiner Walsh: We should have a little bit of foundation [276] for that, then.

Try to get that primary information in, directly, and start from that point.

Q. (By Mr. Stowell): How did you happen to enter into a consignment relationship with this Detroit Flower Growers?

A. At the time when I was shipping to them some items and the prices were too high, and the air freight was too high, and at the time when I started shipping to them, this consignee said that to ship the amount of stuff into that market, I would have to ship them on consignment, and rather than to lose the account, I started shipping to them on consignment.

Q. When you say, "shipping to them on consignment," what do you mean?

I mean, what is the nature of the relationship between you and this Detroit Flower Growers, insofar as consignment sale is concerned? I mean, tell us the mechanics of what happens.

A. I am not very familiar with the consignment business, because we do not do too much of it.

(Testimony of Walter Gillo.)

We will make maybe three to four shipments a week to them, and if we do ship them 20 or 30 dozen gardenias on consignment, it depends on how the market is, and what the price is, and what the gardenias are sold at.

Q. Do you ship on consignment prepaid freight?

A. I do not think we do. [277]

Q. Have you ever shipped prepaid freight on your consignment shipments?

A. Maybe some of them did go out prepaid.

Q. How about this Detroit Flower Growers, do you ship to him on consignment, prepaid or collect?

A. Collect.

Q. Do you know what happens at the other end, after you have tendered flowers to some carrier, and it arrives at Detroit, and it is a consignment shipment, could you tell me what happens?

And by that I mean, does he pay the freight, or what type of money passes hands?

A. He pays the air freight on that.

Q. And the Consolidation charges?

A. Yes.

Q. To whom does he pay that, if you know?

A. Well, I really would not know that.

Q. Then what happens? What happens with the flowers?

A. He accepts the shipments, and whatever it is, he will probably sell that on consignment. If it is 20 dozen gardenias, he will sell that on consignment, at whatever the market price is.

(Testimony of Walter Gillo.)

Q. You say he will sell your flowers on consignment. Do you mean to possibly other retail stores in that area, if you know?

A. Yes. Well, I do not know who he sells them to, but it [278] is just a wholesaler, and he evidently must sell them to retail stores.

Q. As far as you are concerned, though, as soon as he accepts your flowers, he has undertaken to try to sell them for you on a commission basis?

A. That is it.

Q. What happens if he sells some of those flowers outright to some retail store?

How do you know about it?

A. We have a report coming in every week, and it gives us a report on how much he sells gardenias for, and how much they lost. We can probably send them about 15 dozen of gardenias, and they can sell about 12 dozen, and will lose 3 dozen.

Q. By "lose," what do you mean?

A. They are damaged, or they do not sell them in time and they turn brown.

Q. The report which he sends you, is that limited just to sales which he has made outright to retailers? A. Yes.

Q. And then what happens? Does he transmit the money to you?

A. When the report comes in, the first of each week, we get a check that shows the air freight, and the commission that the wholesaler gets, and if there is any gardenias that are left over from the previous week, it goes out the following week. [279]

(Testimony of Walter Gillo.)

Q. Does this Detroit Flowers Growers take its commission on the total amount, and by "total amount," I mean your invoice plus the freight; or does he just take—well, could you tell us just how the percentage is calculated, the commission?

A. If a shipment of gardenias amounted to $25 or $50, that is the selling price.

Q. It is not your price which you suggest to him? A. Oh, no.

Q. Have you ever suggested a selling price to him? A. Never did.

Q. Have you ever indicated that he must not sell these flowers in any event at less than a certain figure? A. I never did.

Q. Will you continue, please, on the mechanics of the percentage?

A. Well, if there is 25 or 30 dozen of gardenias, and they amounted up to $50 or $100, they would deduct 25 per cent of what they sold the stock for, and then we would deduct the air freight.

Q. And by "air freight" you mean other charges which he may have paid when he received such consolidation and pickup, and so forth?

A. That is right.

Q. Now, let us assume that at the end of the week he has sold your flowers, half of them outright, and half of them on [280] consignment. How would the report read to you at the end of that week?

A. I do not get that question.

Q. Suppose you shipped him 100 flowers, and

(Testimony of Walter Gillo.)

at the end of the week, he has sold 50 outright to retail stores, and he has sold 50 on consignment. You get a report, you have testified, at the end of every week; is that correct? A. Yes.

Q. Would that report read, "100 flowers sold," or "50 flowers sold"?

A. It would show 50 flowers sold, and the balance of the 50 would go on the next week's report.

Q. Until such time as he made an outright sale of the balance of the 50 flowers?

A. That is it.

Q. What happens if he is not able to sell outright the balance of those 50 flowers?

A. On the report that we get back, it shows the amount of so many flowers damaged that should not be sold.

Q. What happens on a consignment shipment if he refuses to accept it? Suppose the market is glutted and he does not feel he can sell the flowers, and he does not want it.

A. I have never had any shipments on consignment refused.

Q. Are you acquainted with the general selling practices in the flower industry? [281]

Mr. Gaudio: Where?

Mr. Stowell: In the San Francisco area.

A. Yes, I am.

Q. (By Mr. Stowell): Will you give us your opinion as to what the rough proportion would be of flowers sold on consignment, and flowers sold outright, if you know?

(Testimony of Walter Gillo.)

Mr. Gaudio: Just a moment. I submit it calls for his conclusion.

Mr. Stowell: It does, and I am trying to qualify him as a person who——

Mr. Gaudio: That is not the proper form of qualification, as far as any foundation is concerned. This witness said he handles few consignment sales, so obviously he would not be an authority on that question.

Q. (By Mr. Stowell): How many years have you been in the flower business, Mr. Gillo?

A. I have been in the flower business since '41.

Q. In San Francisco or elswhere?

A. I was in San Francisco, and I moved down to San Mateo. That was in '42.

Q. Are you a member of the national association of flower people? A. Yes, I am. [282]

Q. Do you have direct contacts with flower growers in this area? A. Yes, I have.

Q. About how many contacts would you say that you have had during the last 10 years?

A. With all the growers?

Q. Yes. Have you at least had a contact with almost every grower in this area at one time or another? A. Yes, I have.

Q. Have you had many discussions with them about problems of selling flowers east of California?

A. Quite a bit.

Q. Have they discussed with you the problems of selling flowers on consignment, as against selling them outright?

(Testimony of Walter Gillo.)

A. No, I never did talk about that.

Q. Has the situation of selling flowers, either on consignment or outright, ever been discussed at any meetings that you have attended with other flower growers?

A. Well, I do not think I have ever attended any meetings with any other growers.

Mr. Stowell: No further questions.

Examiner Walsh: Your objection is sustained, impliedly.

Mr. Gaudio: Thank you, Mr. Examiner.

Examiner Walsh: Cross-examination, Mr. [283] Gaudio.

Cross-Examination

By Mr. Gaudio:

Q. In the event of the failure of your receiver to sell these flowers that were taken by him on consignment, there is a loss at both ends, is there not? He does not make any money, and you do not make any money? A. Quite a few times.

Q. However, he charges you, none-the-less, for the cost of transportation that he had to pay in receiving those flowers, does he not? A. Yes.

Mr. Stowell: Mr. Examiner, I believe he has testified that he never had a situation like that, and therefore I object on the ground that he would have no knowledge, no personal knowledge as to what might happen. It is a speculative situation, and I do not see how this witness could possibly answer a speculative question which he has never had any experience with.

(Testimony of Walter Gillo.)

Examiner Walsh: Let us have the question read back.

(Question read.)

Examiner Walsh: And the previous answer was that at times you lost money on those consignment transactions?

The Witness: Yes.

Examiner Walsh: I think the question is proper. He may answer.

Q. (By Mr. Gaudio): And that deduction is taken on a subsequent report [284] where he might have made the sale. In other words, later on, if he makes a sale of flowers received by him on consignment, then he takes the transportation for the loss or damaged flowers that might have been sustained at an earlier period from the proceeds of a subsequent sale; is that the general practice?

A. Well, I have not got too much experience on consignment business, because we do not do too much of it, and like I say, there is only this one account that we ship three to four boxes a week, and I know for a fact, of all the consignment business we ever do, we always lose money, and I never keep much interest in that.

Q. I believe you testified earlier that these reports show what proportion of the particular shipment could not be sold by him, and might have been dumped; is that right? A. Yes.

Q. And to that extent the transportation costs for those flowers is taken from a subsequent sale?

(Testimony of Walter Gillo.)

A. Yes.

Q. And charged to your account?

A. That is right.

Q. You were one of the original members of Bay Area? A. Yes, I am.

Q. Are you generally familiar with the purposes and the reasons for its organization?

A. Well, not too much. [285]

Q. As a member of Bay Area, and as a grower of flowers, particularly, is it of any interest to you as a shipper and member to be apprised from time to time of market conditions and growing conditions in the eastern markets? A. It is.

Q. Is your business particularly affected by the weather conditions in the eastern markets?

A. At certain times.

Q. Has it ever occurred in your experience as to your particular flowers, that the lack of a market, because of extreme weather conditions in the eastern markets might have advanced your business here on the West Coast? A. It could have.

Q. In that respect are you particularly interested in weather conditions as reflected by weather reports, or what is commonly know as a florists' weather report, insofar as the east is concerned?

A. Yes.

Q. Do you know anything about traffic matters, that is, insofar as service and rates applicable to air carriers, are concerned?

A. No, I have had very little experience on that. The office takes care of all that.

(Testimony of Walter Gillo.)

Q. And in so doing, do you utilize the service of Bay Area to apprise your firm of available rates via air carriers? [286] A. I do.

Q. Your membership is in good standing by the payment of dues in Bay Area; is that correct?

A. Yes.

Mr. Gaudio: No further questions.

Examiner Walsh: Mr. Wolf.

Q. (By Mr. Wolf): Mr. Gillo, the last answer you made on direct examination was that you did not attend meetings of flower growers. Do you recall that answer? A. Yes.

Q. Does that mean that you do not attend the meetings of Bay Area membership?

A. I never did, but I have had one of the employees attend the meetings.

Q. I see. I gather from your testimony, Mr. Gillo, that you do not like the consignment business; is that correct? A. No, I do not.

Q. You never can tell what you are going to get for your merchandise, can you? A. That is it.

Q. If all of your buyers requested that you use Airborne to ship, would you do so?

A. The buyers? You mean the——

Q. Consignees, yes. [287]

A. Well, yes, I would.

Mr. Wolf: No further questions.

Examiner Walsh: Redirect, Mr. Stowell?

(Testimony of Walter Gillo.)

Redirect Examination

By Mr. Stowell:

Q. In your dealings with the Detroit Flower Growers, in connection with these consignment shipments, has it ever occurred that one week would go by and they would report no outright sale of flowers?

A. We would get a report back that would show what amounts they would sell, and they would wire us either to stop shipping——

Q. Would you get a check every single week?

A. Yes.

Mr. Stowell: No further questions.

Examiner Walsh: Mr. Gaudio.

Recross-Examination

By Mr. Gaudio:

Q. Mr. Gillo, I believe you testified earlier that only 20 per cent of your shipments, approximately, are routed via airborne service. Do I take it from that, that the balance, insofar as air shipments are concerned, goes by Bay Area? A. Yes.

Q. Does that mean that these requests for shipments have predominated in favor of Bay Area, or do you, on your own initiative, select and direct your shipments by Bay Area? [288]

A. We direct quite a few by Bay Area, and a lot of consignees demand us to ship by Bay Area.

(Testimony of Walter Gillo.)

Q. Would you say that the vast majority of your consignees request service through Bay Area?

A. Yes.

Q. Has it ever occurred in your experience that all of your consignees have requested—ever requested your using Airborne service?

A. No, they have not.

Q. This marked disproportion between the Bay Area traffic and that handled via Airborne, is that because of any complaint as to the Airborne service?

A. I did not hear the whole question.

Q. This disproportion between the shipments handled by Bay Area and Airborne, is that because of any complaint the receivers had regarding Airborne service and rates?

A. Well, a lot of them were on account of the rates. A lot of the consignees were complaining that the rates were too high, and by talking to a lot of the consignees over the telephone, I suggested to them to try Bay Area. And by doing so, we would find that the rates would be from $1.00 to $1.50 a box cheaper through Bay Area.

Q. Is the consignee's concern in that particular because of the local competition which he has to meet as affected by the delivered cost to him of the merchandise? [289] A. It is.

Mr. Gaudio: No further questions.

Examiner Walsh: Mr. Wolf?

Mr. Wolf: No questions.

Mr. Stowell: No questions.

Examiner Walsh: You may be excused. Thank you, Mr. Gillo.

(Witness excused.)

Mr. Stowell: I would like to call Mr. Zappettini for a very few questions.

Whereupon,

WILLIAM ZAPPETTINI

was called as a witness for and on behalf of the Enforcement Attorney, and, having been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Stowell:

Q. Will you give your full name to the reporter, please? A. William Zappettini.

Q. What is your occupation, Mr. Zappettini?

A. Wholesale florist.

Q. Would you tell us in what cities you have places of business?

A. San Francisco, Los Angeles, Dallas and Fort Worth, Texas. [290]

Q. Are you one of the largest flower wholesalers in the United States?

A. Well, I would not say the largest.

Q. One of the largest?

A. One of the wholesalers in the United States.

Q. How many years have you been in the flower business, Mr. Zappettini? A. Since 1921.

Q. And since 1921, you have attended many association meetings of flower growers?

(Testimony of William Zappettini.)

A. I did.

Q. Have you ever been an officer of a national flower association?

A. Not an officer. Well, pertaining over large administration?

Q. Yes. A. No.

Q. Do you have a good knowledge of the flower selling industry, the marketing? A. I do.

Q. In such knowledge, Mr. Zappettini, would you say that a large number of flower shipments are sold on consignment to people east of California?

A. You refer to the methods, selling flowers?

Q. Yes, methods of selling from this area. [291]

A. From California will be about 50 per cent. Some wholesalers have more, and some wholesalers have less, because it is hard for me to determine the average. Some of the wholesale firms do sell out all their production on consignment basis, and some sell them on outright basis, so therefore I do not know whether my figure of 50 per cent is correct or not.

Q. But nevertheless, it is a very important way of selling flowers? A. Yes, that is right.

Q. And if you were to eliminate consignment selling in the flower industry, would it be your opinion that the marketing of flowers might be seriously affected?

A. Well, let us take a moment to let me decide that. Although the method has been used by our people, it seems that the consignment of flowers—

(Testimony of William Zappettini.)

direct sales are more satisfactory to keep an eye over the wholesaler.

Q. Do you sell flowers on consignment, Mr. Zeppettini?

A. Very small amounts, very small proportion of our sales are made on consignment basis.

Q. Are there any other methods of selling in the flower industry, in addition to selling flowers on consignment and by outright sale?

A. Not that I know of.

Mr. Stowell: No further questions.

Examiner Walsh: Cross-examination, Mr. [292] Gaudio.

Mr. Gaudio: With due respect to Mr. Zappettini, Mr. Examiner, I would like to defer cross-examination. We will go more into his operations on direct examination by Respondents.

Examiner Walsh: Mr. Wolf.

Mr. Wolf: No questions.

Mr. Stowell: Thank you, Mr. Zappettini.

Examiner Walsh: You are excused. Thank you.

(Witness excused.)

Mr. Gaudio: Mr. Examiner, before we adjourn, there is one element of Mr. Gillo's testimony that I would like to clarify, and I would like to recall him very briefly.

Whereupon,

WALTER GILLO

recalled as a witness for and on behalf of the Enforcement Attorney, having been previously sworn, was examined and testified further as follows:

Further Cross-Examination

By Mr. Gaudio:

Q. Mr. Gillo, you testified earlier that you have used the services of Airborne, is that correct?

A. Yes.

Q. And in that connection, has Airborne ever refused any of your shipments?

A. You mean pickup delivery?

Q. Pick up your shipments for air transportation. Have [293] they ever refused to do that?

A. No, never did.

Q. That did not occur during the last Christmas season? A. No, it did not.

Mr. Gaudio: That is all.

Mr. Wolf: No questions.

Examiner Walsh: That is all. You are excused. Thank you.

(Witness excused.)

Mr. Stowell: If the Examiner cares to continue, I would like to call Mr. Bonaccorsi for a very few questions.

Whereupon,

JAMES F. BONACCORSI

was called as a witness for and on behalf of the Enforcement Attorney, and, having been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Stowell:

Q. Will you give your full name, please?

A. James F. Bonaccorsi.

Q. What is your business, Mr. Bonaccorsi?

A. Golden Gate Wholesale Florists, Inc.

Q. Are you a member of the Bay Area Association? A. Yes, the company is.

Q. Do you ship via Airborne?

A. Occasionally we do, yes. [294]

Q. What motivates you to ship by Airborne on those particular occasions?

A. Most of the accounts request Airborne service. The shipments they are receiving, most of the accounts request Airborne service.

Q. Do you receive many requests from consignees to ship via Bay Area?

A. No, I do not.

Q. You mean that all the shipments which you make via Bay Area are at your own instance and initiative?

A. We have a person in our office whose job is to try to land the flowers as cheaply as possible to the consignee, and therefore we have found that Bay Area naturally is cheaper, so we route them

(Testimony of James F. Bonaccorsi.)

through there. If they are not satisfied, we ship them the way they want.

Q. Have you ever received any requests at all from customers east of California to ship via Bay Area, that you can remember?

A. We may have had one or so, but that is about the extent, as far as my company is concerned.

Q. Do you ship on consignment, Mr. Bonaccorsi?

A. Yes, we do.

Q. More than half of your business is consignment? A. Last year it was, yes.

Q. Who is Ed Cereghino? [295]

A. Ed Cereghino is a representative of the Golden Gate Wholesale, Inc., the eastern representative, I might add.

Q. Does he work exclusively for you?

A. No, he does not.

Q. Do you know the names of the other persons for whom he performs service?

A. Yes, he performs services for Buford Hall in Los Angeles, and I believe he sells prepared eucalyptus for Floral Service, here in the Bay Area. He may have some gladiola growers in Florida, that I am not sure of.

Q. Mr. Bonaccorsi, in your dealings with Mr. Cereghino, have you ever given him any sales material for advertising, circulars, or literature?

A. We have. Very little.

Q. Did any of that literature mention the Bay Area service? A. Not to my knowledge.

(Testimony of James F. Bonaccorsi.)

Q. Have you ever told Mr. Cereghino that he should mention the Bay Area service as a selling point in selling flowers on your behalf?

A. No. The only thing I told Mr. Cereghino—in fact, I did not have to tell him, he knew, himself, already, that shipping by Consolidation would save the ultimate consignee some money. There was no need for me to tell him that. He knew that.

Q. Insofar as your consignment shipments were concerned, [296] do you know whether or not he had that same knowledge?

A. I presume so, if he had the knowledge. He understands Consolidation prior to the time that we applied for his services, as he had been working on this before, as far as his personal end of it, with a carrier, attempting to do such a thing before this organization came into being.

Q. Do you have any knowledge as to whether he has mentioned Bay Area to potential accounts on the east coast while trying to sell flowers for you?

A. That I would not know.

Q. Has he ever mentioned to you that he has mentioned the name of Bay Area in trying to drum up business for you?

A. Not to my knowledge.

Q. Have you ever corresponded with Mr. Cereghino?

A. Most of the correspondence is handled by Mr. Curt Lyon.

Q. Is he an employee of yours?

(Testimony of James F. Bonaccorsi.)

A. He is an employee of mine, and he is called the Sales Manager of our organization. He is the man that does all the corresponding back and forth daily, with Mr. Cereghino, our eastern representative.

Q. Have you ever examined any of the correspondence between——

A. Most all the correspondence is examined by me afterwards. In other words, the copies of the letters are put on my [297] desk, and I usually look at them a day or two later. There are perhaps some that have escaped me, no doubt.

Q. Do you also examine the incoming correspondence from Mr. Cereghino?

A. Most of them, yes.

Q. To your knowledge, has he ever mentioned Bay Area in any of that correspondence?

A. Oh, no doubt he did mention Bay Area. Just how he mentioned it, I would not know at this particular time.

Q. Have you ever tried to secure the services of a break bulk agent in Philadelphia to perform break bulk service for flowers shipped by you and other shippers in this area?

A. An occasion has arisen in Philadelphia. Our service was very poor, and it came to my attention that there was a trucker who could perform the service, or better service. Cereghino being on the east coast, he was authorized—in other words, it was brought up at one of the Board meetings that he could be authorized to contact

(Testimony of James F. Bonaccorsi.)

this particular trucking company in behalf of the Association, but he was authorized by the Board members to do so.

I think that is perhaps what you are trying to bring out.

Q. And of your knowledge, did Mr. Cereghino contact this particular trucker?

A. As far as I know, he did, yes.

Q. Is this trucker now accepting Bay Area shipments? [298] A. I do not think so.

Q. Has the Association made any payments to Mr. Cereghino for this service?

A. Not as yet.

Q. But you contemplate receiving an invoice?

A. Any expense that he might have incurred, I am sure that the Association would stand behind us, since they authorized us to act in their behalf.

Q. Does Mr. Cereghino sell flowers for you in Philadelphia?

A. Yes, he does. That is his territory.

Q. In what other cities besides Philadelphia?

A. I think I will take back what I said a little earlier. There is New York state, Pennsylvania—the east coast, in other words, that will simplify it.

Q. Did Mr. Cereghino mention to you how this information came to him that this trucker might be interested in accepting Bay Area Consolidations for break bulk?

A. I think you will have to ask that question again. I did not quite get the first part of your question.

(Testimony of James F. Bonaccorsi.)

Q. You testified that it came to your attention via Mr. Cereghino——

A. I must retract that. No.

Q. I am sorry.

A. I do not remember saying that. [299]

Q. How did it come to your attention that this trucker in Philadelphia might be available for Bay Area's shipments?

A. We just assumed that he was available. He is in the trucking business. He must be a common carrier. I do not think he is reserved to do business for just an exclusive group, as far as my knowledge is concerned. He is registered with the I.C.C. He must therefore be approved to perform services.

Q. Did any suggestions come from Mr. Cereghino about the potential trucks available in Philadelphia by this trucker?

A. I think you better ask that again, please.

Mr. Stowell: Would you read that question, Mr. Reporter?

(Question read.)

A. I would say no to that.

Mr. Stowell: No further questions.

Examiner Walsh: Cross-Examination, Mr. Gaudio?

Mr. Gaudio: No, I will reserve examination until a later point.

Mr. Wolf: I have a few questions.

Examiner Walsh: Mr. Wolf.

(Testimony of James F. Bonaccorsi.)

Cross-Examination

By Mr. Wolf:

Q. Have you met Mr. Cereghino, Mr. Bonaccorsi? A. Have I met him? Yes.

Q. Do you know of your own knowledge that he has solicited business for Bay Area? [300]

A. I said no.

Q. You do not know?

A. That is right, I do not know.

Q. You have stated that the Board of Directors has asked Mr. Cereghino to call on this trucker?

A. That is correct. The Board of Directors of Bay Area.

Q. Of Bay Area? A. That is correct.

Q. Are you a member of the Board?

A. Yes, I am.

Q. That was done by letter?

A. It must have been done by letter, because it could not have been done any other way, unless it was by telephone. I would say it was handled by letter, but I am not positive.

Q. Do you think the letter could be produced?

A. If there is such a letter existing, I would say yes. In fact, if I may add, I think that I was instructed to write Mr. Cereghino to that effect, now that I come to think about it, and I can produce something to that effect, I am sure, if it is necessary.

Q. You wrote the letter?

(Testimony of James F. Bonaccorsi.)

A. No, I did not. Mr. Lyon, our Sales Manager, I told him what to write.

Mr. Wolf: I see. Thank you. That is all.

Mr. Stowell: I have just one question. [301]

Redirect Examination

By Mr. Stowell:

Q. Mr. Bonaccorsi, do you know that Mr. Cereghino uses Bay Area as a talking point in selling flowers?

A. He has not been instructed by me to do so. If he has done it on his own, I could not possibly know.

Q. But do you actually know whether he does?

A. Talk about Bay Area? How can I know? He has not been instructed by me, so how do I know?

Q. Just give us a yes or no answer. Do you know of your own knowledge whether, in selling your flowers, he mentions Bay Area?

A. No, I do not know.

Mr. Stowell: No further questions.

Examiner Walsh: You may be excused. Thank you.

(Witness excused.) [302]

* * *

JOHN C. BARULICH

was called as a witness for and on behalf of the Enforcement Attorney, and having been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Stowell: [303]

* * *

Q. Let us take Kansas City. Assume that Mr. Bonaccorsi has some boxes which he wants shipped to Kansas City on a consolidation, but it so happens that at the end of the day you have not collected a single additional box going to Kansas City.

What would your procedure be?

A. If it is a lone box destined to Kansas City for break bulk, we reserve the right, or are empowered with the right to take that box to the next consolidation point and transfer it there.

Now, in many instances, a lone box to Kansas City might finally become part of a St. Louis consolidation, and railed or sent by air, whatever the case may be, out of St. Louis, as a break bulk point.

Q. Suppose it is not possible. Suppose that there is no nearby break bulk point where you could form this new consolidation ultimately going to Kansas City. Then what?

A. In that type of a case, if we knew during the course of the day, or when they called in the morning, and they had one box for Kansas City, and we knew we had no other boxes, we would inform him that it was a single box, or a lone box,

(Testimony of John C. Barulich.)

and he would then tell us, or give us instructions as to what should be done, and in many cases, they just say, "Well, go ahead and make a straight shipment of it."

Q. Suppose you are requested to pick up a box for a straight shipment destined to a certain point, and you discuss [330] that, in fact you have many boxes going to that point, and the box requested would fit in very beautifully for consolidation.

Do you advise the shipper that you recommend that that box be consolidated?

A. We never had that occasion arise, although we respect the shipper's wishes, because there are many hidden factors that become part of this shipping. We do not know what his arrangement is with the ultimate receiver. It may be a point that a passenger carrier services, and a freight carrier does not. A consolidation may be moved via a freight carrier, and he is landing in a field 20 miles away from this particular customer. There are many reasons for it.

We just do not arbitrarily consolidate it. If it comes in on a manifest with no indication for straight movement, that is word to us to consolidate it the best way available.

Q. Now, let us assume again that Mr. Bonaccorsi has boxes both for straight shipments, and for consolidated shipments. Your driver picks up the boxes, and how does he place them in the vehicle?

(Testimony of John C. Barulich.)

A. That is discretion. For example, he is liable for the load, and usually in our particular type of operation, the driver has to load the complete truck. He will try to load the truck in accordance with the off-load by carrier. By that I mean United Air Transport's straight shipments, and Consolidated shipments might be within an allocated space [331] within the vehicle, and the same goes for Tiger and Slick and American, TWA, whatever the case might be.

Q. Then the method of placing in the vehicle is designed to facilitate off-loading, but does it have any relationship to whether the particular box is a straight shipment box, or a consolidated box?

A. No differentiation between them, if that is what you mean. None at all.

Q. What happens as your truck driver approaches your operations office? Does he stop to pick up further papers in connection with those boxes?

A. He comes to the office at the field, brings all the paper work, regardless of straight shipments or consolidated shipments, into the office, and there is personnel there that either prepare the air lines billing, or by that time they have made up air bills, so that when the load is off-loaded at the carrier, the billing is with the merchandise so that the movement can be expedited.

Incidentally, I failed to make one point clear, there, that you should know, that the type of mer-

(Testimony of John C. Barulich.)

chandise being shipped is taken into consideration in consolidations, and so forth.

As an example, take the life of a type of flower, roses. If we did not have a consolidation into Detroit, we would not arbitrarily take a rose shipment to Chicago and rail it up.

We would pay the higher rate for service. [332]

* * *

VIRGINIA C. DECIA

was called as a witness for and on behalf of the Enforcement Attorney, and, having been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Stowell:

Q. Mrs. Decia, would you please give your full name to the reporter?

A. Virginia C. Decia.

Q. What business are you in, Mrs. Decia?

A. In the wholesale flower business.

Q. What is the name under which you do business?

A. California Floral Company, at Redwood City.

Q. Mrs. Decia, do you ship by air?

A. Yes, we do.

Q. How long have you shipped by air?

A. I believe since they started to ship by air, we shipped either by Airborne or by Bay Area.

(Testimony of Virginia C. Decia.)

Q. Would you say that your first air shipment was made in 1947? [335]

A. Thereabouts, yes.

Q. Can you recall how you shipped by air, by what air carrier?

Mr. Gaudio: In 1947?

Mr. Stowell: Yes.

The Witness: By Airborne, I believe the first shipments were made. Yes, definitely Airborne.

Q. (By Mr. Stowell): Did you ship by Airborne throughout 1947?

A. I am not exactly sure of the date, but it was about that time when Consolidated was instigated, the beginning of the organization.

Q. Did you ship by air in 1948?

A. Yes, we have shipped by air ever since.

Q. Have you ever shipped over any other service than Airborne? A. Yes.

Q. Can you tell us the circumstances which led you to ship via this service other than Airborne?

Mr. Gaudio: I am assuming that when she did not ship via Airborne, she went Bay Area.

Mr. Stowell: Is that correct, did you ship via Bay Area?

The Witness: Bay Area was not organized at the time.

Q. (By Mr. Stowell): Did you have anything to do with the organization of [336] Bay Area?

A. Yes.

Q. Would you tell us the circumstances, insofar

(Testimony of Virginia C. Decia.)

as they involved your participation in the organization of Bay Area?

A. Well, it was more or less of a thought that was gotten up through Mr. Decia, myself and Clyde Reynolds, and several of the other shippers, to start a consolidation shipment. He was to see if we could save money in working with the airlines, which they were very willing to help.

We thought of starting another organization, which would probably save possibly more money to our consignees, definitely not ourselves, because it was to be a non-profitable organization.

Q. Do you ship on consignment, Mrs. Decia?

A. No, we do not.

Q. Mrs. Decia, I show you a document which has previously been marked as EA-318, and ask you if you recognize it?

A. Yes, this was a document that was made out at the beginning of the other organization.

Q. Can you tell me if the original document differed in any material respect from this carbon?

A. There is another original document. I do not have it. The files were turned over after I resigned from the organization.

Q. Is it your testimony that the original of this [337] document should be in the possession of John C. Barulich? A. That is correct.

I have a letter to prove that he picked up the papers on April 12, 1951, and I resigned from the organization on April 19, 1950.

(Testimony of Virginia C. Decia.)

Mr. Gaudio: Mr. Stowell, do you want to have that last statement corrected to indicate that she has Mr. Barulich's signature on a written demand for all of the documents, records, and other papers belonging to the Bay Area, but that the particular letter in question is not specifically mentioned, nor is it mentioned in the receipt?

The Witness: May I make a correction there?

Mr. Gaudio: Just a moment, Mrs. Decia.

Mr. Stowell: I will ask you the question.

Examiner Walsh: Put the questions one at a time, and they will be answered one at a time.

Now, who was speaking last?

Mr. Stowell: I will put the question to her, Mr. Examiner.

Mr. Gaudio: The question was, Mr. Examiner, with respect to the letter, and the answer given was that yes, the original document was delivered to Mr. Barulich, and "I have his receipt for it," but on production of the so-called receipt, it is merely a signed receipt that the above documents were received, but there is no listing of the documents delivered. [338]

Q. (By Mr. Stowell): Mrs. Decia, do you know that the original of the document referred to as EA-318 was in the papers which you turned over to Mr. Barulich? A. Definitely so.

Mr. Gaudio: Just a moment. I submit that is self-serving. It would not be binding as against Mr. Barulich.

(Testimony of Virginia C. Decia.)

Examiner Walsh: I think we can accept it as a statement of what Mrs. Decia actually had, not as to the question of whether it was turned over to Mr. Barulich's possession. That is another matter.

As I read this letter, it requests any and all files, documents, minutes, etc., pertaining to the business of Consolidated Flower Shipments, Inc.-Bay Area, and consignor Consolidated Flower Shipments, Inc. Your receipt is at the bottom. I must assume that the receipt portion of the document would be all-inclusive of any of the official records and documents of these two organizations; and it would appear, therefore, that such document in all probability was included in those files.

There is a presumption that such document was turned over to Mr. Barulich, and that presumption stands.

Q. (By Mr. Stowell): Mrs. Decia, if I read you a list of names, could you indicate to me whether each name appeared on the original of this document?

A. The original of that document was much longer. It [339] was written on legal paper, because it involved 25 or 30 signatures on it. The names appeared on separate paper. There were three copies. The name was here, the signature of the company there, and there were two places taken, because the name and the party that was given authority to sign with the name of the company, with an address over on this side.

(Testimony of Virginia C. Decia.)

Mr. Gaudio: Is it your testimony that this is not an exact duplicate of the original?

The Witness: There is no signature on that.

Mr. Gaudio: I mean in context and size.

The Witness: No, it was a legal paper.

Mr. Gaudio: This is smaller than the one you are referring to?

The Witness: That is a regular 8 by 12½.

Q. (By Mr. Stowell): Other than the size of the paper and the arrangement of the lines, have you noticed anything here on EA-318 which differs from the original which was actually either mailed or delivered to the addresses?

A. No, I would not know that definitely. As I say, my complete file has been turned over.

Q. Can you recall to whom the original of this document was delivered?

A. One copy, Clyde Reynolds had, one copy I had, and I believe one copy Truce, the attorney, had. [340]

Q. Were the air lines in any way involved in the receipt of this document?

A. No, a copy was sent to the different trucking lines.

Q. If I were to read you the names of certain firms, could you recognize whether that firm or person signed the original of this document?

A. It has been quite a long time, but I could tell you more or less, yes.

Q. Mr. R. J. Adachi?

(Testimony of Virginia C. Decia.)

A. That I cannot swear to. If so, it was quite a considerable time afterwards. I can remember the original one.

Mr. Stowell: May we go off the record a moment, Mr. Examiner?

Examiner Walsh: Off the record.

(Discussion off the record.)

Examiner Walsh: On the record.

Q. (By Mr. Stowell): Will you continue please, with the earlier discussion. What happened after you and some other shippers decided that perhaps a group should be formed to consolidated shipments?

What concrete action did you take, to put that idea into effect?

A. Well, some of the air lines just merely helped. We contacted trucking lines throughout the United States, with the help of Highway Transport in some cases, and Clyde Reynolds [341] rented a place at the airport, and had a man by the name of—I forget the name.

Q. Was it Tal Lloyd?

A. Tal Lloyd in the office, who did the detail work. We went ahead and bought manifests through Sunset McKee. We were operating that way, and at some time along the line, which might have been eight or nine months, Mr. Barulich stepped into the picture, and we were operating very successfully. I believe it is, now, for that matter.

However, I did not see fit to use it, and got out.

(Testimony of Virginia C. Decia.)

In this particular file, there is a list of all the trucking companies.

Q. Mrs. Decia, what office did you occupy with the group? A. Secretary-Treasurer.

Q. For how long?

A. Oh, I could not be exact about that. It might be 11, 12 months or so, I resigned on April 19, of 1950.

Q. In your knowledge, while you were Secretary-Treasurer, was the policy of the Association to accept as a member any responsible flower grower or shipper?

A. Yes, the organization was open to anyone. There was no restriction.

Q. In your knowledge, was anyone's application for membership refused?

A. Never, as long as I was in the [342] organization.

Q. Were there any requirements of dues in order to become a member of the Bay Area group during your administration?

A. Not during my administration.

Q. Were payments made to the Association Treasurer in December, 1949, by exclusively flower persons?

A. I do not understand what you mean by that.

Q. Who paid the expenses of incorporation of Bay Area?

Mr. Gaudio: Just a moment. That calls for the conclusion of the witness, that at the time in question there were any expenses of Bay Area.

(Testimony of Virginia C. Decia.)

Q. (By Mr. Stowell): Were any expenses incurred for the incorporation of Bay Area?

A. Yes, the incorporation papers.

Q. Do you know who paid for those expenses?

A. If I remember correctly, one-half was paid by Clyde Reynolds, and the other half was prorated among the members. If I remember correctly. I am not positive of it.

That is also in the files.

Q. In your knowledge, Mrs. Decia, did you sell flowers to many of the same outlets on the east coast, as the other members of the association?

Mr. Gaudio: If she knows.

Mr. Stowell: I said, "in your knowledge."

The Witness: We all ship practically the same accounts, [343] at one time or another.

Q. Would it be fair to say that the members of Bay Area group competed with each other for the flower market east of California?

Mr. Gaudio: Just a moment. That is objectionable, Mr. Examiner, as calling for her conclusion, except as to California Floral Company.

Q. (By Mr. Stowell): Are you acquainted with the flower growers and shippers in the California area? A. I think I am, for twenty years.

Q. Do you know the type of merchandise the flower growers and shippers have available?

A. That is right.

Q. Do you know where they seek outlets for their products?

(Testimony of Virginia C. Decia.)

A. Eastern markets, naturally.

Q. Do you seek an outlet in the eastern markets?

A. I do.

Q. In your opinion, did you consider the other members of the association competitors for those eastern markets?

Mr. Gaudio: You are speaking now of the California Floral Company?

Mr. Stowell: Yes.

Q. Did you consider yourself, and by "yourself," I mean the California Floral Company?

The Witness: Well, any man that is in the flower business [344] is a competitor of yours.

Q. But insofar as these eastern markets were concerned?

Mr. Gaudio: I submit that calls for a conclusion.

There is no foundation that insofar as she shipped to the east, to Pittsburgh, Miami, St. Louis, Kansas City and any of the others, at the same time and while she had a market available, they shipped to those same points, and it calls for a conclusion that they are in any extent competitive.

Mr. Stowell: Mr. Examiner, I asked her very specifically.

It seems to me I have laid a sufficient foundation.

Examiner Walsh: She can give an answer whether she considers she had competition, particularly as to certain consignees, at various eastern points. That is something that I think a person may be presumed to have knowledge of.

(Testimony of Virginia C. Decia.)

The Witness: Are you speaking of an outright sale, or consignment, as being in competition?

Q. (By Mr. Stowell): I merely mean whether the products which you had for sale during the period of your administration, whether in seeking markets for those products by consignment sale, or outright sale, or otherwise, you considered that the other members of Bay Area group were your competitors for the eastern markets?

A. Yes, they were my competitors.

Q. Were you aware of the arrangements between the association and Mr. Reynolds from the time the organization was [345] formed as a corporation until you resigned?

A. Mr. Reynolds was paying the—yes.

Q. Do you know whether there was ever any understanding between Mr. Reynolds and the Association, which prohibited Mr. Reynolds from operating any independent consolidation activities—and by that I mean, from operating any other consolidation business for other persons wholly distinct from the Bay Area group?

A. You have me confused there.

Do you mean his handling hard freight?

Q. Yes. For example, was there any understanding that he could not operate a consolidation for hard freight?

A. Well, he was handling hard freight. Whether it was involved in the consolidation, I do not know that end of it.

(Testimony of Virginia C. Decia.)

Q. But to your knowledge, was he precluded by any arrangement, oral or written, or otherwise, from handling flowers or hard freight in a consolidation for any other persons, other than Bay Area? A. No.

Q. Mrs. Decia, during your activity with the Bay Area group, did you ever ship over any other service, other than Bay Area?

A. I cannot remember whether we were using Bay Area exclusively, or not, because there were incidents where some accounts would ask for Airborne, and Airborne was also willing [346] to pick up whether we——

Q. Can you tell me whether in fact you did route those shipments, and instruct Airborne to pick them up?

A. Yes, I believe they called.

Q. Do you know of your own personal knowledge, during your administration, whether any of the other members of Bay Area used the services of another carrier?

A. Yes, there were several other organizations that were using both.

Q. I take it, then, that there was no understanding amongst the membership that the members were exclusively to use the services of Bay Area, once they joined the group?

Mr. Gaudio: Just a moment.

Mr. Examiner, by the Enforcement Attorney's own evidence in this case, there were at least 25

(Testimony of Virginia C. Decia.)

members, and in the absence of any specific record as to what any such understanding might have been, I submit without a further foundation, that this witness would be purely speculating as to whether or not they ever did, whether there was any understanding that they would, or they should not, or any other circumstances.

Mr. Stowell: Mr. Examiner, she was Secretary-Treasurer of the group, and she certainly was the official custodian of the minutes, I take it.

Examiner Walsh: Let us ask Mrs. Decia if she knows of any prohibition against these members from using the services of [347] another indirect carrier.

Q. (By Mr. Stowell): Mrs. Decia, would you answer the question of the Examiner, please?

A. No, there was nothing like that. They could use either service. It was entirely up to them, up until the time I left the organization.

Q. I understand. All of my questions are limited to the period of your connection with Bay Area.

Do you know whether a member, in joining Bay Area, undertook to offer any particular amount of shipments to Bay Area? A. No.

Q. Your answer is that a member did not undertake to——

A. He did not have to promise any particular amount, or anything.

Q. Can you tell me how many charter members there were, or how many persons signed the original of EA-318?

(Testimony of Virginia C. Decia.)

A. No, there was somewhere in between 20 and 25, I surmise. I do not remember the exact amount.

Q. Can you recall how many there were when you left the organization?

A. About the same amount. A few extra growers were added, and a few had dropped out, so it was approximately that amount.

Q. About when did you say you terminated your connection [348] with Bay Area, Mrs Decia?

A. On April 19, 1950.

Q. Did you also discontinue shipping via Bay Area, about that time? A. That is correct.

Q. What service did you use, subsequent to that?

A. Airborne.

Q. Do you know whether any other shippers about that time also ceased shipping via Bay Area?

A. That I would not be positive of.

Q. Do you know the date when Reynolds sold his stock to Airborne?

A. That I would not know.

Q. Did you give any kind of notice, verbal or written, to Bay Area, of withdrawal from the Association?

A. Yes, a letter addressed to Mr. Zappettini, who was President of the orgainization at that time.

Q. What were the circumstances which led to your withdrawal from Bay Area?

A. I just did not see fit to use their services any more.

(Testimony of Virginia C. Decia.)

Q. Did you join any other association after you discontinued using the Bay Area service?

A. There is no other organization that you have to join, to ship.

Q. Did Mr. Barulich come around to speak to you at any [349] time after you withdrew from Bay Area?

A. He might have been at the office. I was not there. He might have spoken to Mr. Alexander, who is my Manager.

I just recall, Mr. Stowell, that there was another organization which never functioned, which I think practically everyone in this room signed, with reference to shipping consolidated shipments, but I do not believe it ever functioned.

Q. Mrs. Decia, prior to the time that you withdrew from the organization, were there meetings among the shippers to determine whether others should withdraw?

A. Not that I know of. I never attended the meetings.

Q. You have mentioned that there was another association. What were the circumstances which led to the creation of that organization?

A. I believe they wanted to organize practically all the shippers, and try to make it a stronger body. However, it never functioned. There were several meetings, I believe, up at United Airlines, which I did not attend, so I do not know.

I attended one meeting, I believe.

(Testimony of Virginia C. Decia.)

Q. Do you have any knowledge as to whether officers were elected in that organization?

A. Yes, I believe I was elected Secretary, if I am not mistaken.

Q. Who was elected president of that organization? A. That I do not remember. [350]

Q. Do you have any knowledge as to what happened to Bay Area during the period while this new association was formed?

A. They were still operating.

Q. Is it your testimony that during the oranization period of this new association, members of Bay Area continued to ship via Bay Area?

A. Yes.

Q. Mrs. Decia, was a meeting held in your place of business for the particular purpose of merging of Bay Area and this new association that you mentioned?

A. No. The only meetings that were held in my office was the organizing of Bay Area.

Mr. Stowell: I have no further questions.

Examiner Walsh: We will have a 5-minute recess.

(Short recess taken.)

Examiner Walsh: Come to order, ladies and gentlemen. We have finished your Direct Examination, Mr. Stowell?

Mr. Stowell: That is correct.

Examiner Walsh: Cross-Examination, Mr. Gaudio.

(Testimony of Virginia C. Decia.)

Cross-Examination

By Mr. Gaudio:

Q. Mrs. Decia, this organization of which you were elected Secretary, was that the California Consolidators?

A. I believe you have the name wrong.

I believe it was Northern California Consolidators. [351]

Q. Northern California Consolidators?

A. That is right.

Q. And who participated in that group?

A. At the time that I recall now, there were so many meetings at that time of different organizations, the first meeting was held at my office, and at that time I believe Mr. Reynolds had given his resignation.

It was decided that all the shippers should get together and there was quite a discussion there. I think Ace Hunt was there. He showed what could be done if all the shippers worked together, in the saving of rates, on the total amount of tonnage. And it was decided that there would be a meeting in the United Airlines Conference room some night. Just when that was, I do not remember.

The meeting was held, and officers were elected, and the organization was decided to be incorporated, I believe. Mr. Bowdish was the Executive Secretary at that time.

Q. And you became Secretary?

A. I became Secretary, and I believe Mr. Zap-

(Testimony of Virginia C. Decia.)

pettini became President, and Jim Boodel was vice-President.

Q. What year was that?

A. The early part of 1950, I believe.

Q. The early part of 1950? A. Yes.

Q. Do you know what the status of that group is at this [352] time?

A. I do not believe that it is functioning.

Q. Did you as Secretary ever sign or subscribe to articles of incorporation as such?

A. I believe I did, yes.

Q. Do you know what was done with them?

A. I do not know where the records are.

Mr. Bowdish, as I say, was the Executive Secretary. I was merely a figurehead.

Q. You were merely the Recording Secretary, or something?

A. That is right. He took minutes.

Q. Those documents were not placed in your custody or control? A. No.

Q. Do you know where a copy of such articles would be obtained?

A. I have a copy in my office. Not of the articles of incorporation, no.

Q. Of what particular document?

A. Of a document signed by Mr. MacPherson, the articles. Something similar to this. (Indicating document.)

Q. You mean Mr. MacPherson of Airborne Flower & Freight Traffic?

(Testimony of Virginia C. Decia.)

A. It was going to be worked through him, yes. At that time, I believe Bay Area was not functioning. [353]

Q. Was Bay Area not functioning because of the transfer of equipment formerly used by Mr. Reynolds to Airborne?

A. It might have been, but Mr. Reynolds had given his resignation the latter part of 1949, I believe. I do not remember exactly. The day he came to this meeting, he was invited. He had his attorney along with him, Mr. Truce, I believe.

Q. Had you at that time resigned as Secretary of Bay Area? A. No, I did not resign.

Q. You were still Secretary?

A. I did not resign until April.

Q. And this occurred when?

A. Somewheres about there. The reason for my resigning from Bay Area was the fact that I had signed papers to this other organization.

Q. And when had that occurred, in point of time?

A. Somewheres in the early part of 1950.

Q. And up to that time, as Secretary of Bay Area, you knew of no resolution of the Board of Directors to dissolve formally the organization known as Bay Area?

A. I believe that we were all concerned with the fact that we would not have any trucking.

Q. You were concerned with the fact that you were bereft of any trucking equipment?

A. That is right. [354]

(Testimony of Virginia C. Decia.)

Mr. Wolf: That is not the answer of the witness, Mr. Examiner. The witness said, "We were concerned about the fact that we might not have any trucking." Counsel added the word, "equipment" after "trucking". The witness did not use the word "equipment".

Q. (By Mr. Gaudio): Is it a fact, Mrs. Decia, that the reason was that the organization known as Bay Area, of which you were then Secretary, no longer had available Mr. Reynolds' trucking service or equipment?

A. With reference to equipment, I do not know. With reference to service, he had placed his resignation of not serving us. I do not know what happened to his equipment.

Q. I see. You understand that to have meant his equipment would no longer be available for Bay Area's use?

A. His services would no longer be available. He was dissatisfied with the method that Bay Area was being used. He wanted more money, and I believe that he was dissatisfied also with Mr. Barulich——

Q. But you are not prepared to say at this time, since you do not know, whether in fact that involved the transfer of any equipment to Airborne?

A. I would not know.

Q. Have you ever heard of the California Consolidators?

A. Northern California Consolidators. [355]

(Testimony of Virginia C. Decia.)

Q. No, I am speaking of California Consolidators. A. No, I have not.

Q. Your answer is no? A. No.

Q. Have you ever, in the recent past, arranged for the handling of your shipments through this organization known as California Consolidators?

A. We merely shipped by Airborne, continued to ship by Airborne, inasmuch as this organization never did anything, never functioned.

Q. Would you say it was not a fact that your shipments via Airborne were handled under the name of California Consolidators?

A. Our manifests for the shipments that we make are Airborne.

Q. Airborne printed manifests?

A. That is correct.

Q. You do not know what disposition it made of the shipments, and whether they are handled by an organization called California Consolidators?

A. That I do not know.

Q. When you use the words, "all of the shippers" do you mean all of the shippers that saw fit to subcribe to this letter of invitation to the air lines, or whatever it was?

A. By that it was to be open to both growers and shippers. [356] Anyone could use the service.

Q. Yes, but when you say that Bay Area served all the shippers, are you implying by that that Bay Area served all of those subscribed to the letter?

A. That is right.

(Testimony of Virginia C. Decia.)

I do not know whether they used anyone else.

Q. And your recollection was that this document that they subscribed was longer than Exhibit EA-318?

A. I believe there was additional pages, yes.

Q. I show you what appear to be true copies of articles of incorporation, together with certain amendments to the organization incorporated under the name of Bay Area Flower Shippers & Growers, Inc., and particularly page 3 thereof, showing the names of 19 individual members.

A. I am not familiar with the name Pierce. Oh, that is Al Enoch, Bob Pierce.

Q. Yes.

A. Yes. I am not positive that this fellow Brunetti signed, Oakland Flower Shop.

Q. Now, in your prior testimony, when you say that the names of these members appeared on a longer sheet of paper, are you referring to a document such as this? (Indicating document.)

A. Yes, that size paper, a legal sheet.

Q. And could it have been this document, with the original names written on it, that you say you delivered to Mr. [357] Barulich?

A. Whatever I had in my file was delivered to Mr. Barulich. There were three copies of it. Each individual had to sign three different sheets at the time when they signed it.

Q. The question was, could the document that you had reference to be the articles of incorporation, which was subscribed by all of the members?

(Testimony of Virginia C. Decia.)

A. That is right.

Q. You say it could have been?

A. It could have been.

Q. Exhibit EA-318, dated April 4, 1949, of which you have a copy before you.

Is my understanding correct that this document was prepared for two reasons: first, for subscription by those persons who would be interested in the contents of that document; and then the document would be delivered to the air lines. Was that the purpose of this document?

A. That is right.

Q. Can you state definitely that any single counterpart of this document, with all of the original signatures, was retained by you?

A. That I do not know. I do not remember. There were some of these copies also sent to the trucking lines.

Q. But you do remember that a certain number of them, which was signed in 2, 3, 4 or 5 different counterparts, however [358] you had to distribute, were delivered to the air lines?

Do you remember that?

A. The originals were not delivered to the air lines. The originals, there were only three copies. One was kept in the office, one, Clyde Reynolds had, and one, Mr. Truce.

Q. So that if you do not have the original one of the three that you just mentioned, is it your testimony that Mr. Reynolds or Mr. Truce would have?

A. Or Mr. Barulich.

(Testimony of Virginia C. Decia.)

Q. Unless the document you refer to was the articles of incorporation?

A. Because Mr. Barulich has my complete file. I did not take a listing of what he got. It was the complete file.

Q. But you did, I assume, when Mr. Barulich came into your office, and showed you that letter suggesting that you release all of the records to him, you just opened the drawer, picked up what you had, and delivered it to him?

A. I was not there. Mr. Alexander handed them to him.

Q. You personally did not deliver these documents to Mr. Barulich?

A. No, I did not. Mr. Alexander did. But the complete file is gone. It was very thick.

Q. Then if I understand your testimony correctly, at one time you, as Secretary, had a file in your office containing Bay Area records; is that right? [359] A. That is correct.

Q. Some time in your absence, Mr. Barulich called and left at your office this signed receipt?

A. February 12, 1950.

Q. But you are not certain?

A. They spoke to me on the 'phone. I was home. And I gave Mr. Alexander the authority to release it.

Q. So you do not know which particular documents Mr. Alexander gave to Mr. Barulich?

A. He gave him the complete file.

(Testimony of Virginia C. Decia.)

Q. But you were not present?

A. They would not disappear any other place but to Mr. Barulich.

Mr. Gaudio: Let us ask that last be stricken as not answer to the question.

Examiner Walsh: I think that we are going to have to recall Mr. Alexander. I believe that we will allow that question to remain, to be answered by him.

Q. (By Mr. Gaudio): So it is your assumption, then, and conclusion, that whatever documents you had were delivered by Mr. Alexander to Mr. Barulich?

A. I do not assume anything. I state that he got the complete file.

Q. And you are basing that statement on your instructions [360] to Mr. Alexander?

A. That is correct, because I talked to Mr. Alexander at the very time that Mr. Barulich was in the office.

Q. What did you say to Mr. Alexander?

A. I told him to give him the complete file. I had requested him, a year before, to pick that complete file up.

Q. And he said he would?

A. He did give him the file.

Q. You mean, when you talked to Mr. Alexander on the telephone, he said in answer to your direction, that he would do so?

A. He said that he would.

Q. When did your firm, California Floral Com-

(Testimony of Virginia C. Decia.)

pany, decide that continuing to use Bay Area would no longer effect any savings or economies for your firm?

A. I did not state that. I stated that I did not care to use their service any more, and resigned, stopped using it.

As a matter of fact, I stopped using their service before my letter of April 19, 1950.

Q. Then the discontinuance of your use of Bay Area's facilities and service was not because of any failure to obtain the objectives which you sought when you first organized it?

A. The organization was not being run as I saw fit to belong as a member.

Q. Are you implying that the function of the various [361] officers and directors did not meet with your approval?

A. For personal reasons, yes.

Q. Are you ascribing your resignation or termination of your activities strictly on a personal basis?

A. The way I operate my business, yes.

Q. Have you been able to realize the same economies which I assume you enjoyed while you used Bay Area, since you have gone to Airborne?

A. Yes, I believe their service is exceptionally good.

Q. Do you obtain the same benefits, insofar as your costs of transportation are concerned?

A. I do.

(Testimony of Virginia C. Decia.)

Q. You do?

A. With the exception that I do not have to pay a membership fee to ship through Airborne.

Q. In other words, you get the same rate from Airborne, and you do not have to pay a membership fee? A. That is correct.

Mr. Gaudio: I think that is all.

Examiner Walsh: Mrs. Decia, I would like to ask you about this document indentified as EA-318, which is the letter that you have before you.

At the time that you had that document before you, were there any other pages attached, or was it a single page?

The Witness: This document, if I remember correctly, was [362] a document made up by Mr. Truce for the air lines, and for the trucking companies that we were trying to get to handle our shipments at the other end, and they had to have some signatures on them. This was not the original with all the signatures.

Examiner Walsh: It was a single page, was it, or were there other pages?

The Witness: There were other pages attached.

Examiner Walsh: Would you recognize it as being pages similar to the document that Mr. Gaudio just showed you, which I believe he described as the articles of incorporation?

The Witness: It was not that thick.

Examiner Walsh: Mr. Wolf?

Mr. Wolf: Yes, I have a few questions.

Q. (By Mr. Wolf): Mrs. Decia, I am in-

(Testimony of Virginia C. Decia.)

terested in this organization that has been mentioned, Northern California Consolidators.

Is that the name? A. That is correct.

Q. Do you recall when any meetings were had in regard to that organization?

A. The original meeting was held at my office in Redwood City.

Q. About when?

A. The early part of 1950.

Q. And do you remember how many flower growers attended [363] this meeting?

A. I know that the Board of Directors had a meeting before it was opened to the rest of the members, and I believe Mr. MacPherson was invited at the time. There might have been 10 or 12 of us, including Ace Hunt, from Slick Airways.

Q. At that time, was there any membership list of the new organization?

A. Not at that meeting, but at the next meeting, which was held at the United Air Lines Conference room, the members signed up.

Q. When was that next meeting?

A. The date I do not recall too closely.

Q. Do you remember, in relation to the first meeting in February, when it was? Within a month, two months?

A. It must have been, because right after the meeting at United Air Lines, I wrote my letter resigning from Bay Area.

Q. Now, after this second meeting that you re-

(Testimony of Virginia C. Decia.)

call being held at United Air Lines, how many people were present, approximately?

A. Oh, there might have been 25 or 30, possibly more.

Q. Were a number of them flower growers and shippers?

A. There were flower growers and shippers.

Q. Do you recall any of the names of the flower growers at that meeting, who were then members of Bay Area?

A. You mean shippers and growers, both? [364]

Q. Yes.

A. Yes, there was Mr. Zappettini, there was James Bonaccorsi, and there was ourselves, there was Jim Boodel, and there was, I believe, T. Ozawa, and I believe Kitayama was there, from San Francisco Wholesale.

Exactly the different names, I do not recall. I can remember a lot of them that did come, that did not sign up.

Q. Do you know whether a membership list is in existence anywhere?

A. Yes, I believe that Mr. Bowdish would have that list.

Q. Mr. Bowdish? A. That is right.

Q. Where is he?

A. He is the Executive Secretary of this other flower shippers' association that we have, and at that time it was decided that they would have him as Executive Secretary of this new organization

(Testimony of Virginia C. Decia.)

that they were planning on. He is in San Francisco.

Q. Is there another flower shippers' association in existence? A. Yes, there is.

Q. What is the name of it?

A. Northern California Flower Shippers.

Q. Is that the same organization that was formed in 1950?

A. Neither one. Northern California Flower Shippers [365] is strictly wholesale flower industry organization.

Q. What was the reason, if you know, for the formation of Northern California Consolidators?

A. The idea was to get as many of the shippers as we possibly could do, to get the poundage, to save our consignees money on their flower shipments.

Q. Was the organization sponsored in any manner by the members of Bay Area? A. Yes.

Q. What members?

A. Mr. Bonaccorsi, Mr. Zappettini, Mr. Boodel, myself, at the time.

Q. Why did you feel it was necessary to form a new organization?

A. If I recall correctly, there was a short time there that Bay Area was not functioning, and we figured that by starting a new organization of this kind, we could, as I say, save money.

Q. Do you recall why Bay Area was not functioning? A. That I do not know.

Q. It just stopped functioning, so far as you know?

(Testimony of Virginia C. Decia.)

A. I believe that Mr. Reynolds resigned. His services were not there any more, and I do not know what happened to Mr. Barulich.

Q. If I were to state to you that Mr. Reynolds resigned in [366] April of 1950, could you subscribe that his resignation in April of 1950 was the only reason for the non-functioning of Bay Area?

A. That I would not know.

Q. How were flowers shipped during this period when Bay Area was not functioning, through what means, if you know?

A. Well, in our case, we were shipping through Bay Area.

Q. Do you know how the other growers were shipping?

A. I surmise through Airborne. That was the only other organization.

Q. You say that Northern California Consolidators never became operative; is that correct?

A. That is correct.

Q. And Bay Area began functioning again, do you remember that? A. That is right.

Q. Do you recall under what circumstances, or why Bay Area commenced to function after the cessation of business?

A. I believe that Mr. Barulich contacted the different shippers and growers, and formed an organization of his own.

Q. When you say you believe that Mr. Barulich formed an organization of his own, you are not im-

(Testimony of Virginia C. Decia.)

plying that another organization was formed, are you?

A. That I would not know. I do not know any details of it.

Q. Do you recall that the original name of the organization [367] that we are referring to now as Bay Area, was Bay Area Flower Shippers & Growers, Inc.? A. That is right.

Q. Do you recall that in June of 1950, the name of the corporation was changed to Consolidated Flower Shipments, Inc.-Bay Area, which is its name today; do you recall that?

A. That is correct.

Q. Now, when you say that Mr. Barulich formed an organization of his own, could it be that with the advent of Mr. Barulich into this proposition, the name of the corporation was changed? Do you know that?

A. I am not familiar with any of the new organization——

Q. In any event, your testimony is that Bay Area ceased to function for a period sometime in 1950; that it then commenced to function again, some time thereafter, and your recollection is that Mr. Barulich was the moving source whereby the Bay Area group started to function again; is that correct? A. That is correct.

Q. Do you ship to Charles Fudderman in New York? A. I do.

Q. Has he ever asked you to ship via Bay Area?

(Testimony of Virginia C. Decia.)

A. He has demanded for us to ship by Bay Area.

Q. Has he given a reason for that demand?

A. It seems like they have a salesman, or something, in the east, by the name of Cereghino, and Fudderman claims that [368] he could save money by shipping through Bay Area. I asked for bills back, but I have never received them.

Mr. Wolf: That is all. Thank you, Mrs. Decia.

Examiner Walsh: Any Redirect, Mr. Stowell?

Mr. Stowell: No.

Mr. Gaudio: May I follow up on the questions asked by Mr. Wolf, in order that the record may be clear?

Q. (By Mr. Gaudio): Mrs. Decia, I show you these documents again, the amendments to the articles which changed the name to Consolidated Flower Shipments, Inc.-Bay Area, subscribed the 10th day of January, 1950, over the name of William Zappettini as President, and Virginia C. Decia as Secretary-Treasurer.

That was the date, was it not, January 10?

A. I do not remember the exact day.

Mr. Wolf: Mr. Examiner, may we have a copy?

They have a certified copy of the articles and the amendments to the articles of Bay Area, and we will be glad to agree to putting it in any time you wish.

Mr. Gaudio: We are going to produce it in due course. It will be a part of the record. I am trying to keep the names straight, now. Counsel seemed to

(Testimony of Virginia C. Decia.)

imply that the name change took place in June of 1950.

You do not remember?

The Witness: I would not remember definite dates. [369]

Q. (By Mr. Gaudio): But this document is a true copy, is it?

A. If my signature is on it.

Q. Well, it is from the file that you say you turned over to Mr. Barulich.

A. But I would not remember the day.

Examiner Walsh: What I am interested in knowing is whether there was a name in between there, which did not have the "Inc" in between, or is that——

Mr. Gaudio: The original incorporation was Bay Area Flower Shippers & Growers, Inc. On January 10, 1950, duly filed in the office of the Secretary of State of the State of California, on January 25, 1950, by amendment to the articles, the corporate name was changed to its present form, Consolidated Flower Shipments, Inc.-Bay Area.

Mr. Wolf: Mr. Examiner, at one time there was an organization without the letters "Inc" after the name. Counsel will correct me if I am wrong. I believe the original organization was unincorporated, with the same name as the subsequent corporation, but without the "Inc" behind the name.

Is that correct?

Mr. Gaudio: Frankly, I do not know that far

(Testimony of Virginia C. Decia.)

back in the history, but I believe that is correct. Mr. Barulich will confirm that, in due time.

Examiner Walsh: And then that was superseded by the [370] corporation?

Mr. Wolf: That is correct.

Examiner Walsh: And that was titled Bay Area Flower Shippers & Growers, Inc.?

Mr. Wolf: That is right.

Mr. Gaudio: Then that name was changed to its present form on January 10, 1950.

Q. (By Mr. Gaudio): Now, is that the organization that you were referring to, or is there yet another organization that is apart from Bay Area, as it is now known?

A. There was another organization started, which is not functioning.

Q. That was the Northern California Flower Shippers? A. That is right.

Q. Now, has that anything to do with the San Francisco Flower Growers Association, or any other similar group? A. None whatsoever.

Q. Did you ever read the articles of incorporation of this Northern California Flower Shippers? A. No, I did not.

Q. Were any ever subscribed?

A. I believe so. I believe Mr. Bowdish could give you all that information.

Q. I was just trying to learn for this record at this [371] point if you could tell us essentially what the purposes of that organization were?

(Testimony of Virginia C. Decia.)

A. Well, it all started—I was not at that meeting—with hiring a man by the name of Van Duker, that was going to be a traffic manager, if I remember correctly, and he had this idea of starting this organization and trying to get all the shippers in the floral industry together to save, as I say, this terrific amount.

Examiner Walsh: Did you not testify before that you were interested in obtaining greater poundage for your shipments?

The Witness: That is correct.

Q. (By Mr. Gaudio): You mean by that, that the greater weight of the shipment, which might be comprised of many component parts, the more money you would save on rates?

A. The greater amount of shippers in the organization would be the saving on rates.

Q. I show you what purports to be a copy of a written consent of members to amend the articles to change the name to Consolidated Flower Shipments, Inc.-Bay Area, and call your attention to that list of names. Will you glance over them and tell me how many there are, and if you recognize those names as any part or number of the ones that signed the letter of April 4, referred to as Exhibit EA-318?

A. Well, I believe there are two changes. [372]

Q. Two additional names?

A. If I remember correctly, I do not remember Yamane's name being on the first list, and I am doubtful about Adachi.

(Testimony of Virginia C. Decia.)

Q. Did you count them? There are 19, are there not?

A. As I say, there were members that came in, and members that dropped out.

There are 19 on there.

Q. And your best recollection at this time is that of the 19 which appeared on the written consent to the amendment, 17 of them also subscribed to Exhibit No. EA-318?

A. If I remember correctly, there were 19 names on the other list, too.

Q. Have any of your customers asked for the Bay Area service you ceased to be actively engaged as a member?

A. This one account in New York. And that is when I called up Mr. Barulich to use his service, and he told me that they would not be able to pick up at our packing house unless we paid $50 to belong to the organization. So therefore I did not use the service.

Q. Was that the first knowledge you had of the membership dues, or membership fee assessment?

A. No. I received a letter from Mr. Barulich on October 24, 1951, that we had been dropped out because we had forfeited our privileges in the organization by not paying our dues, and that the sum of $50 was the annual dues. [373]

Mr. Gaudio: If I may at this point, if the Examiner please, and with counsel's consent, I would like to read this letter into the record. It is over the letterhead of Consolidated Flower Shipments,

(Testimony of Virginia C. Decia.)

Inc.-Bay Area, October 24, 1951; "California Floral Company, P. O. Box 4, Redwood City, California. Dear Sir: In accordance with the resolution of the Board of Directors and the articles of incorporation and by-laws of Consolidated Flower Shipments, Inc.-Bay Area, you are hereby notified that your membership in this Association, together with privileges thereunto pertaining, have been forfeited, and you have been dropped from the rolls as a member, for failure to pay annual dues in the sum of $50.

"Reinstatement as an active member entitled to all of the privileges of this Association will be subject to the approval of the Board of Directors, upon such terms as may be imposed, pursuant to the articles of incorporation by-laws and resolution of the Board of Directors of Consolidated Flower Shipments Inc., Bay Area. Very truly yours, Consolidated Flower Shipments, Inc.-Bay Area, By John C. Barulich, Executive Secretary."

That is all.

Examiner Walsh: If there are no more questions of Mrs. Decia, you may be excused. Thank you, Mrs. Decia.

(Witness excused.)

Mr. Stowell: I would like to call Mr. Nuckton at this time. [374]

Whereupon,

JOHN NUCKTON

was called as a witness for and on behalf of the Enforcement Attorney, and having been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Stowell:

Q. Mr. Nuckton, what is your exact name?

A. John Nuckton.

Q. What is the business name under which you function? A. John Nuckton, Inc.

Q. Incorporated?

A. It is now, since the first of the year.

Q. What was the earlier name?

A. John Nuckton & Company.

Q. Was it a partnership prior to the first of the year?

A. Well, we acted as if it was a partnership. It belongs 100 per cent to me, but I had partners without capital investments.

Q. What business was John Nuckton & Company engaged in?

A. Buying and selling cut flowers.

Q. Is that also true of the corporation?

A. Yes, the same.

Q. Are you a member of Bay Area, Mr. Nuckton?

A. Yes, sir. [375]

Q. Are you also an officer of Bay Area?

A. Yes, sir.

Q. When did you become an officer of Bay Area?

(Testimony of John Nuckton.)

A. At the last annual meeting, which should have been last June, if I am not mistaken, May or June.

Q. Of 1951? A. Yes.

Q. Prior to that time, were you active in the affairs of Bay Area?

A. I was a member and director.

Q. When were you first made a director of Bay Area?

A. I am not sure whether that was the year before. I am not sure when I became a director. Am I allowed to ask Mr. Barulich?

Q. Well, subject to correction by records, insofar as you know, would you care to ask Mr. Barulich?

A. Yes.

The Witness: Does the record show when I became a director?

Mr. Barulich: Yes, the first year you were secretary-treasurer, also a director. At the last annual meeting, which was in June, you became the president.

Examiner Walsh: Do you adopt that as a true statement?

The Witness: Yes.

Q. (By Mr. Stowell): Mr. Nuckton, do you sell flowers in New York City? [376] A. Yes.

Q. Do you sell flowers in Philadelphia?

A. Well, I send them there. I do not sell them, really, I send them on consignment.

Q. Are all of your shipments on consignment?

A. No, about 95 per cent.

(Testimony of John Nuckton.)

Q. Have you ever engaged the services of Edward Cereghino? A. No, sir.

Q. Have you met the person?

A. I have known him for years.

Q. Has Mr. Cereghino ever attended a meeting of the Bay Area group?

A. No, not when I was present, and I believe I have been present at all meetings, except one or two.

I can tell you more about Mr. Cereghino.

Q. Continue, please.

A. He is an agent for Golden Gate Wholesale Florists, and for the Los Angeles outfit. He has no connection at all with Bay Area.

Q. None whatever? A. No.

Q. Did you hear the testimony of Mr. Bonaccorsi this morning? A. No.

Q. Mr. Nuckton, you are very active in the affairs of [377] Bay Area at the present time, are you not?

A. I attend all the meetings, and all the directors' meetings.

Q. Did you ever devote any time to Bay Area during the working day, at your place of business, if necessary? A. Yes, if necessary.

Q. Mr. Nuckton, I am going to show you a document. I would like to have you examine it. It is a photostatic copy of a document which reads, to Philadelphia: "We have received a routing order from you requesting that we move our shipments via the services of the airport forwarding company operating from this area"—mainly by Airborne.

(Testimony of John Nuckton.)

Would you examine it, please?

Do you recognize that document, Mr. Nuckton?

A. No. I write so many letters. I would have to read it through, first.

Q. Please do. Do you recognize the document?

A. Yes.

Q. Were the originals thereof ever mailed? By "originals" I mean the final letters.

Mr. Gaudio: Do you mean, was a letter substantially in this form——

Mr. Stowell: ——mailed out as an original, yes.

The Witness: Yes, I would think so. It looks like it. [378]

Q. (By Mr. Stowell): The top of that paper says, "John, what do you think of this letter to the Philadelphia accounts who sent in routing orders?" Who is "John"?

A. That would be John Barulich. No, that would be John Nuckton. I think I see the whole story in back of that document, now.

Q. Who drafted the document?

A. This was drafted by John Barulich, because a representative of Airborne had been going around to several people and had them ask routing orders, which is easy to obtain.

A nice fellow comes around and asks you to sign such a thing, and it does not mean anything to them, anyhow, because I pay the freight. So they gave it to them.

There were several of these things that came

(Testimony of John Nuckton.)

through, and I felt it necessary to do something about it. I personally did not pay any attention to the routing orders, because I pay the freight anyhow, and I follow the cheapest way, and if anyone in New York or Philadelphia tells me to ship via so-and-so, that does not mean a thing to me, if it costs me more. They do not pay; I pay.

Q. (By Mr. Stowell): Incidentally, have you had any requests from your consignment consignees to route via Bay Area? [379]

A. No, but I have had them from representatives of Airborne who had been around in the east and obtained signatures on their forms.

Q. Please continue.

A. I felt it necessary that something had to be done about that, and I told John Barulich, and we discussed it. And he felt it was necessary that we should write a letter, over my signature as president, to tell them the situation, tell them the story, tell them why we could not follow these routing orders, because it was costing us money. And Mr. Barulich sent me this form.

Q. This draft?

A. This draft of a letter, suggesting that I write that. I thought it was better if I wrote it myself as a shipper, rather than as president of Bay Area. So I used part of his words, and scratched out others, and made it as my own letter, and sent it out.

Q. You stated it cost you more money when you shipped via Airborne. Is that true, insofar as you ship on an outright sale?

(Testimony of John Nuckton.)

A. No, it costs the customer more. And indirectly, it costs me more, because if rates go up too high, he stops ordering with me. He considers his whole cost, not only the cost of the merchandise, which is sometimes less than half of the total [380] cost.

Mr. Stowell: I have no further questions.

At this time, I move that this document be marked for identification as EA-323.

Examiner Walsh: Has that document been sufficiently described in the record?

Mr. Stowell: I believe it has. I read the first few sentences into the record.

Examiner Walsh: That will be marked for identification as Enforcement Attorney's Exhibit No. 323.

(The document above referred to was marked for identification as Enforcement Attorney's Exhibit No. 323.)

Mr. Stowell: I will defer offering it, if you prefer.

Mr. Gaudio: The thought occurred to me that the witness testified that this particular draft was not released, but that if he recalls correctly, a similar letter was, and if that is what the Enforcement Attorney is interested in, it will be our purpose to develop where the true copy of that is.

Mr. Stowell: I would like to have them both in. Could you produce a true copy?

Mr. Gaudio: Just a moment. If this letter in the

(Testimony of John Nuckton.)

form as indicated by Exhibit EA-323 for identification, was not released, for whatever reasons Mr. Nuckton might have seen fit at the time, I submit it would not be material or pertinent in this [381] case.

Mr. Stowell: Mr. Examiner, I feel that both the actual letter which was sent out, and the draft, are pertinent, indicating the steps which led to the ultimate letter.

For example, he pointed out that first they thought that letter would go under John Nuckton's signature as president, and then it was decided that it would go under his individual name. That illustrates that even though the final letter may have gone out under his name as a shipper, perhaps the letter was actually a Bay Area document, at least one step in a possible inference in that direction.

Therefore, I feel that we should have the draft as well as the original, for any inferences which the Board may care to make.

Also, the draft has on it the comment which I read to him, and all that should be considered in the light of his testimony, as well as the actual letter which went out.

I therefore request that the Examiner have the witness supply us with a copy of the actual letter which went out, and that that be marked for identification, and both documents be offered in evidence.

Examiner Walsh: I will ask Mr. Nuckton to furnish a copy of the letter which was actually sent, and we will mark this draft for identification as

(Testimony of John Nuckton.)

Enforcement Attorney's Exhibit No. 323, and we will reserve Exhibit No. 324 for that particular copy when it is produced. [382]

(Enforcement Attorney's Exhibit No. 324 was reserved for marking the document above referred to.)

Mr. Stowell: Mr. Nuckton, will you undertake to produce a copy of the letter which actually went out?

The Witness: I am not sure that I have a copy. In a case like that, I mostly type my letters myself, and I probably did not go to the trouble of making a copy, and kept that as a copy. I do not see how the thing got here. It belongs either in my file, or in my wastebasket.

Mr. Stowell: For your information, that was secured from the files of Bay Area, by the Enforcement Attorney.

Will the attorney for the respondents undertake to supply——

The Witness: May I complete this—I will say that this is a copy of a letter that I wrote personally as a shipper.

Mr. Gaudio: Just in case that document is not available, according to the witness' testimony, if he only wrote a single original and mailed it, maybe I ought to ask this question:

Q. (By Mr. Gaudio): Can you recall, Mr. Nuckton, if with the deletions marked herein, the part remaining was the form and substance of a

(Testimony of John Nuckton.)

letter which was in fact sent, or was it further changed, if you know?

The Witness: No, I would not expect so. I would think that I sent the letter exactly like this, after the changes had been made. [383]

Mr. Gaudio: The changes noted on this particular draft?

The Witness: Yes, but I did not send it for Bay Area, I sent it for myself.

Mr. Gaudio: Can you say now that you do not have any copy of the letter which was actually sent?

The Witness: It is possible. I would have to go and dig deep. And my secretary is sick, so I do not know how I could do that.

Mr. Gaudio: Let us say for the record that if a copy is available, we will produce it.

If it is not available, maybe for the purposes of this record, the witness' testimony will be sufficient that a letter similar in form to Exhibit EA-323, with deletions noted thereon, was issued. Is that right, Mr. Nuckton?

The Witness: Yes.

Mr. Stowell: Who is doing the examining now? I have forgotten.

Examiner Walsh: I believe you had just concluded your direct examination.

Mr. Stowell: I would like to ask one more question of Mr. Nuckton.

Q. (By Mr. Stowell): To whom was the final version of that letter sent?

A. To a number of wholesalers I do business

(Testimony of John Nuckton.)

with. I sent it probably to all those that sent in one of these routing [384] order forms that I had obtained from a traveling man there, and nobody objected to this, they were all satisfied with my telling them that I was not going to do it, and was shipping by Bay Area all the time because I could not afford it the other way.

Mr. Stowell: No further questions.

Examiner Walsh: Cross-examination, Mr. Gaudio.

Cross-Examination

By Mr. Gaudio:

Q. Mr. Nuckton, since you sent the letter which has been indicated as Exhibit EA-323, have your customers expressed any dissatisfaction with service now offered or since received, on shipments handled by Bay Area?

A. This No. 323, is that this thing here?

Q. Yes.

A. Yes, I have not had any more routing orders. In any event, I am the one to decide how this stuff is routed, because I pay the price.

Q. You felt that inasmuch as from indication on these routing slips that came in raised some question in your customers' minds, you felt that it was necessary to explain why you were shipping via Bay Area? A. That is right.

Q. Have you had any complaints from your receivers, regarding the method in which their shipments have been received? [385]

(Testimony of John Nuckton.)

A. No, sir, on the contrary.

Q. Insofar as Bay Area shipments are concerned? A. No, sir.

Q. Have any of your shipments been routed via Airborne?

A. Only in very few instances, to Pittsburgh only, because services of Airborne were available there, while Bay Area's service was somehow interfered with. We were told that deliveries through Bay Area were always made late in the day there, after the market was over. For some reason the trucker handled both, and he for some reason gave Airborne preference, until this thing was remedied again, somehow, and now we have our own consolidation into Pittsburgh, and are satisfied with the service there, again.

Q. Have you had occasion to ship to New York, Mr. Nuckton?

A. Yes, I ship there very often.

Q. Which particular service do you use, the organization's service as Bay Area, or Airborne?

A. Always Bay Area.

Q. To New York? A. Yes.

Q. And have your customers registered any complaint as to those shipments?

A. No, not about Bay Area's shipments.

Q. Have there been any complaints on the New York [386] shipments via Airborne?

A. Yes. I have one particularly in mind where Airborne charged $1.80 some-odd freight, where the actual freight should have been $1.20 and some dollars—about 50 per cent more.

(Testimony of John Nuckton.)

The lady shipped to was very much perturbed about it, and she even had difficulty in getting them to adjust it. They refused it at first. She had to threaten finally to make complaint with Washington, she said, before they adjusted it.

Q. Have you found in your experience that the question of rates delivered to your customers in the handling of these flower shipments is of vital importance to your marketing of flowers in the east?

A. Yes. We buy stuff for cash, and we ship it out C.O.D. and our net profit after our expenses are paid is only about $1.00 a box. So it stands to reason if our shipping went up by even $1.00, we would have to close our doors.

Q. It is your testimony that at least in your experience for your shipments, the question of rates is the basis of complaints in general which you have received from your customers, or is it both rates and service?

A. We do not get complaints. We just simply do not get our money.

Q. In other words, your net is affected by the cost of the transportation of your customers?

A. Oh, very much. The cost of transportation is more [387] than the cost of the merchandise.

Over the whole year, perhaps it is a little less, but the kind of merchandise we ship now, I happened to figure a week's business the other day, and it worked out that 69 per cent of what the stuff brought at the other end, went for transportation,

(Testimony of John Nuckton.)

and 31 per cent went to us and the producers together.

That was acacia and heather. And so, naturally, $1.00 a box is more vital, would put us out of business.

Q. Were you one of the charter members, so-called, of Bay Area? A. No, I was not.

Q. When did you first come into the picture?

A. In the spring of 1949. That was the first crop. I was not buying any merchandise then. I only sold what I produced myself. And that was the first crop I made in California.

Q. You were both a shipper and a grower?

A. At that time, I shipped my own grown flowers only.

Q. Prior to your association with Bay Area, did you use any other shipper?

Did you ship by air, prior to your association with Bay Area?

A. No, I shipped through Bay Area from the start. This must have been in March, 1949.

Q. From the inception of your selling flowers in the [388] east, you used Bay Area's service?

A. Yes, except during the time that Reynolds broke his contract with Bay Area and lost his trucks and stopped handling it, and Bay Area was out of business.

Q. What did you do?

Examiner Walsh: I think that testimony is a little bit at variance with the testimony given by Mr. Reynolds.

I think he testified the truck was sold, and I do

(Testimony of John Nuckton.)

not think there is anything in the record so far that Mr. Reynolds broke a contract. I think we should have that portion of the record straightened out.

Mr. Gaudio: Maybe the witness is using the wrong word.

Examiner Walsh: Did you mean it in that sense?

The Witness: I only meant to say that he stopped doing what he was doing, prior to that.

Q. (By Mr. Stowell): Did you have any need for any service during that period when, as you say, Bay Area was not functioning?

A. At that time, there was not much going out. I recall one instance, though, where I had to use Airborne, and that is the instance that I just mentioned, where I was overcharged 50 per cent.

Mr. Gaudio: That is all.

Examiner Walsh: Mr. Wolf. [389]

Q. (By Mr. Wolf): Mr. Nuckton, let us get to this instance where you were overcharged 50 per cent by Airborne.

How many boxes of flowers did you ship on that occasion?

A. I could not tell you offhand, the number of boxes, but the freight should have been $1.20 and some dollars, and actually $1.80 and some dollars was paid.

Q. Do you know the dimensions of the boxes that you shipped on that occasion?

A. Those are very small boxes, 20 inches by 10, or something like that, and sent out in bundles.

(Testimony of John Nuckton.)

Q. Do you remember when this shipment took place? A. Yes, in June, 1949.

Q. Is it possible that the overcharge in freight was due to wrong measurements or wrong dimensional weights given?

A. Well, the lady said that she could not even get a refund. They denied there was overcharge until she threatened to go to Washington.

Q. Who paid the freight on that shipment?

A. It was paid by the consignee and charged back to me.

Q. Paid by the consignee?

A. Yes, and charged to me. It was a consignment deal.

Q. What was the lady's name?

A. Well, I have the letter. Do you want me to read it?

Q. No. What was the lady's name?

A. Mrs. Nungesser. [390]

Q. And then she got her money back from Airborne, did she not?

A. She finally did, after threatening.

Q. She got it back, did she not? She filed a claim for it, did she not?

A. She finally got it back.

Q. I say, did she file a claim for it?

A. She does not say that.

Q. But you know that if you want some money back from any type of carrier you have to file a claim, do you know that, Mr. Nuckton?

A. Yes.

(Testimony of John Nuckton.)

Q. And you know very well that the first thing you do if there is damage to a shipment, or miscalculation of freight charges, you file a claim, do you not? A. Yes.

Q. That is the first thing you do?

A. Sure.

Q. After the claim is filed, it is processed, is it not? A. Yes.

Q. The air line, or the forwarder, or whoever the carrier is, looks into the validity of your claim, does it not?

Q. And then if it finds that the claim is valid, it pays you back, does it not? A. Yes. [391]

Q. Now, that was what happened to this lady, was it not? A. Well——

Q. Was it or was it not, Mr. Nuckton?

A. Well——

Q. Mr. Nuckton, did she get her money back?

A. I told you that.

Q. All right. She filed a claim for it?

A. She did not say that she did.

Q. I am not interested in what she says. I am asking you.

A. All I know is what is in the letter before me.

Examiner Walsh: That is all the witness can testify to.

Q. (By Mr. Wolf): This Exhibit EA-323, what was the purpose of sending this out to your Philadelphia wholesalers?

A. Since I can take any routing I want to, it was merely courtesy, telling them why I was not

(Testimony of John Nuckton.)

going to follow these routing orders they sent, and they were satisfied with it.

Q. You felt that if your Philadelphia accounts received a letter like this, that it would produce more business for Bay Area, did you not?

A. No.

Q. You would not produce less business, would you? A. That was not my purpose.

Q. If the letter was received by your [392] Philadelphia accounts, and complied with, there would be more business for Bay Area, would there not?

A. There could have been. That was not the purpose of my letter.

Q. I am not asking you at this moment what the purpose of the letter was.

Mr. Gaudio: I thought that was your question.

Mr. Wolf: Yes, and then I asked another question.

Examiner Walsh: Let the witness state his purpose.

Q. (By Mr. Wolf): What was your purpose?

A. The purpose of the letter was to effect a saving for myself.

Examiner Walsh: My understanding from the previous testimony was that it was a matter of self-interest.

The Witness: That is right, sir.

Q. (By Mr. Wolf): On the top of the letter is this note which has been called to your attention, Mr. Nuckton: "John, what do you think of this

(Testimony of John Nuckton.)

letter to the Philadelphia accounts who sent in routing orders?''

If your sole purpose was to save money on your own shipments, why did you have to consult John about it?

A. Because we consult John about many matters in connection with shipping. [393]

And that is from John Barulich to me, that is not from me to him.

Q. The note on top of this letter, ''John, what do you think of this letter'' and so forth, whose note is that? Yours, or Mr. Barulich's?

A. That is Mr. Barulich's.

Q. That is his note to you?

A. Yes, it looks so to me. It does not make sense, otherwise.

Q. So he was the first one that thought of this letter? A. No.

Q. Who did?

A. We discussed it over the 'phone. I told him that I was getting these routing orders, a representative of Airborne brought me these routing orders, and I told him we have got to do something about that, and asked what he suggested. And he came back with the suggestion that Bay Area, over my signature, write this and that, which I rejected, and said I am going to write it myself.

Q. I see. Why did you not want to send it out in the name of Bay Area?

A. Because I was not running Bay Area. I was only running my own business.

(Testimony of John Nuckton.)

Q. I see. When was the date of this letter?

A. I could not tell you, sir. It should be on there. [394]

Q. Do you know what year it was?

A. Last year.

Q. 1951? A. I would think so.

Q. You were a director at that time?

A. Yes.

Q. When did you become president?

A. June, I was president at that time. Otherwise he would not have asked me.

Q. But you just said a moment ago, you were not running Bay Area, but you were president and a director? A. I presided at the meetings.

Q. You have something to say about the policy?

A. I did not make any policy. I did not do any work except preside at the meetings.

This is not the usual corporation, where the president is the head. The president only presides at the meetings. It is a co-op.

Q. As a matter of fact, Mr. Nuckton, the original thought behind this letter was that you could increase the Bay Area's service in the east, was it not?

A. It might have had that secondary effect.

Q. Yes, and then you considered that matter, and thought that it might not be very good if Bay Area solicited business in the east, didn't [395] you?

A. I felt it might be the consignees were not interested in Bay Area, or any other outfit. They

(Testimony of John Nuckton.)

were interested in getting flowers. And I explained to them why I was not following their suggestions, because I could not afford it.

Q. I see. You mentioned something about trouble in Pittsburgh with trucking. Did I understand you correctly? A. Yes.

Q. And do you have a trucker there now, in Pittsburgh?

A. It would seem so. Of course, Mr. Barulich handles all of these details. I do not know. I know our stuff goes through Bay Area, and it is satisfactory now. For a while it was not, although there was a saving, at first, the service was not there, because the trucker fell down on the job. The trucker delivered other merchandise in the morning, and ours later in the day.

But it has been cleared up somehow. I do not know the details.

Mr. Wolf: Thank you very much, Mr. Nuckton.

Examiner Walsh: Any redirect, Mr. Stowell?

Redirect Examination

By Mr. Stowell:

Q. Mr. Nuckton, who calls meetings of the Board of Directors?

A. They are set for a certain date, some certain day each month, the third Tuesday, or something. I never remember, [396] and Mr. Barulich reminds each director of that date.

Q. To your knowledge, has Mr. Barulich ever called meetings of the Board of Directors?

(Testimony of John Nuckton.)

A. He has told me that it was advisable, and I have given him authority to call such a meeting. Particularly with this difficulty we are in now, we have had to have special meetings.

Q. Of your knowledge, do you know whether Mr. Barulich himself called the various directors, called a meeting, and subsequently called you for ratification? A. No, I would not think so.

Mr. Stowell: No further questions.

Mr. Gaudio: That is all. No questions.

Mr. Stowell: At this time, Mr. Examiner, I move that the document previously marked for identification as EA-323 be admitted in evidence.

Mr. Gaudio: No objection.

Mr. Stowell: It is understood, then, Mr. Examiner, that the finalized version of this——

Examiner Walsh: If a copy of the original letter which was sent can be submitted, it will be identified as EA-324, and will be received in evidence.

And this photostatic copy of the draft, Exhibit EA-323, is received in evidence.

(The document marked as Enforcement Attorney's Exhibit No. 323 was received in [397] evidence.)

The Witness: If it is in my file, I will bring it in the morning.

Mr. Stowell: Thank you, Mr. Nuckton.

(Witness excused.)

Mr. Stowell: At this time I would like to call Mr. Lloyd.

Whereupon,

J. TALMADGE LLOYD

was called as a witness for and on behalf of the Enforcement Attorney, and having been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Stowell:

Q. What is your name, please?

A. J. Talmadge Lloyd.

Q. What is your present occupation?

A. I am an office employee of H. H. Cutler Company.

Q. What occupation were you engaged in, in 1948, if you recall?

A. In 1948 I must have become employed by Mr. Reynolds.

Q. Were you ever employed by Western Air Lines? A. Yes.

Q. About how long did you work for Mr. Reynolds? A. About 15 or 18 months.

Q. During your service with Mr. Reynolds, did you ever observe Mr. John C. Barulich in his [398] office? A. Yes.

Q. What were your duties with Mr. Reynolds, very briefly?

A. General office work, record keeping, and

(Testimony of J. Talmadge Lloyd.)

contacting flower shippers to ascertain their outgoing shipments for the day.

Q. Do you have any knowledge of the circumstances which resulted in Mr. Barulich's becoming associated with the operation? A. Yes.

Q. Will you state what those were?

A. Mr. Reynolds employed Mr. Barulich as sales and public relations man.

Q. How do you know that?

A. Just from discussion with Mr. Reynolds.

Q. Did you observe Mr. Barulich in action?

A. I do not believe Mr. Barulich and I ever called on any accounts together, if that is what you mean.

If you mean did I observe him working in and out of the office, yes.

Q. Do you know whether Mr. Barulich did any soliciting of persons to either become members of Bay Area, or to ship via Bay Area?

A. Yes, he did. I think that was part of his duties, yes.

Mr. Gaudio: I ask that the answer be stricken.

Mr. Stowell: I do not want you to think, I want you to [399] tell me what you actually know, insofar as you were able to see from your observation, or hear.

Examiner Walsh: Just what do you know personally, from observation?

The Witness: Yes, that was my understanding of his job, and I am quite sure that he did that.

Mr. Stowell: I have no further questions.

(Testimony of J. Talmadge Lloyd.)

Examiner Walsh: Cross-examination, Mr. Gaudio.

Cross-Examination

By Mr. Gaudio:

Q. Who gave you that understanding, Mr. Lloyd?

A. Mr. Reynolds, my employer, and my association with Mr. Barulich.

Q. From the way you saw him come to and from the office, and the conversations that he might have had in your presence, either with Mr. Reynolds, or on the telephone, it is your understanding or observation that he was soliciting either new memberships or other shippers to use Bay Area's facilities; is that right? A. Yes.

Q. When did you first observe Mr. Barulich in any capacity at Mr. Reynolds' place of business?

A. I do not remember the time.

Q. You say you were the office man for Mr. Reynolds? A. Yes. [400]

Q. Where?

A. At the San Francisco Airport.

Q. When did you first go there, to that particular place?

A. I do not recall just when I did go to work for Mr. Reynolds, but it was whatever time I went to work for Mr. Reynolds.

Q. Did you ever work for him in Redwood City?

A. No.

(Testimony of J. Talmadge Lloyd.)

Q. When you first went to work for Mr. Reynolds, was Mr. Barulich there then?

A. No.

Q. How long after you first went to work for Mr. Reynolds did you learn or know that Mr. Barulich was employed by Mr. Reynolds in the capacity you stated?

A. It would only be an estimate, that it was probably six months.

Q. Did your duties take you on the road with Mr. Barulich? A. No.

Q. You stayed in the office at all times?

A. That is right.

Q. Did any person that might be classified as a shipper of flowers come to Mr. Reynolds' office and talk to Mr. Barulich? A. Yes. [401]

Q. Were they members of Bay Area, to your knowledge? A. Yes.

Q. Did any non-member ever come to that office at the airport, in your presence, and talk to Mr. Barulich?

A. Non-member of flower shippers?

Q. Yes. A. Not that I recall.

Q. Any shipper of flowers that you ever saw Mr. Barulich talk to, was a member?

A. So far as I recall.

Q. Did any of these conversations by Mr. Barulich take place over the telephone, in your presence?

A. Conversations with flower shippers?

Q. Yes. A. Yes.

Q. Were they also members of Bay Area?

(Testimony of J. Talmadge Lloyd.)

A. At least all I recall were.

Mr. Gaudio: That is all.

Examiner Walsh: Mr. Wolf.

Q. (By Mr. Wolf): Mr. Lloyd, as a part of your duties, did you answer the 'phone in the office and take care of orders for flower shipments from day to day? A. Yes.

Q. Did you from time to time also ring up the flower [402] shippers to ask them if they would have anything for shipment? A. Yes.

Q. Were you familiar with the names of the members of Bay Area? A. Yes.

Q. Did you have a list of their names?

A. Yes.

Q. Do you recall of any occasion of making a consolidated shipment via Bay Area for a non-member? A. No, I do not.

Q. Do you remember shipments for Lee Brothers?

A. No, I do not specifically remember any shipments for them. I remember they were flower shippers, and I remember that they were points of consideration for membership, but I do not remember any shipments for them.

Mr. Wolf: Thank you.

Mr. Gaudio: No further questions.

Mr. Stowell: No further questions.

Examiner Walsh: Thank you. You may be excused.

(Witness excused.) [403]

* * *

MATTHEW J. BARULICH, JR.

was called as a witness for and on behalf of the Enforcement Attorney, and having been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Stowell: [408]

* * *

Q. So actually in a sense if you haul a box in yourself from the area, consolidate it, and do everything else you are supposed to do with it, you get 60 cents, less five, but if you don't haul it you get 35 cents, less five; is that correct?

A. That is correct.

Q. And you mean that the entire expense that you incur when you bring a box to the airport is subject to transportation tax in the State of California?

A. If you mean that, will this 30 cents be not subject to tax?

Q. I don't know.

A. It will also be subject to tax in this January 1 arrangement, you see.

Q. As a matter of fact, Mr. Barulich, the change was made, wasn't it, because you felt that if you didn't report [555] the whole amount it could be brought up to you that you could be called an airport forwarder, whereas a portion of the money you received was not for forwarding but was for consolidating.

Mr. Gaudio: Just a moment. I will object to

(Testimony of Matthew J. Barulich.)

that as calling for the conclusion of the witness, and for the Board to determine in the light of all the facts.

Examiner Walsh: I think that the witness is well qualified to answer that question.

Mr. Gaudio: That is true.

Examiner Walsh: Because that is a fact that has been already accomplished.

Now, what is the reason for it?

Mr. Gaudio: He has testified as to why he accomplished that fact. Now he is in effect arguing with the witness as to whether in resolving these changes, invoked at the instance and suggestion of the Enforcement Attorney, because he might be an air freight forwarder, regardless of whether he is or whether he isn't. The changes were invoked at the suggestion and instance of the Enforcement Attorney.

Mr. Wolf: I will withdraw that question, and I will ask you this.

Q. (By Mr. Wolf): Was the change in your reporting system to the State of California as to the total amount of money received [556] by you brought about by reason of a conference you had with the Enforcement Attorney of the CAB?

A. You mean in direct connection with transportation taxes?

Q. No, in connection with your reporting of the funds you received, which comes back to the first question I asked you.

(Testimony of Matthew J. Barulich.)

Were you advised to make this change in reporting procedure and report the entire 55 cents as a receipt for transportation of property by the Enforcement Attorney so that it would become in compliance with the Civil Aeronautics Act?

A. Not on that basis, no.

Q. On what basis?

A. Well, the Enforcement Attorney told me, and the members, the Directors of Bay Area, that consolidations as such should be paid for and the expense borne by the shippers. That is what the Directors are trying to do by establishing this five cents, which pays for the consolidation service.

They find now that during these various stipulations and so forth, a period of time elapses, that these charges are not adequate. Five cents possibly will not cover it from now on.

How it is going to be brought about I don't know. That [557] change has not been made.

Although there were stipulations of fact entered into, but not concrete enough to change it.

Mr. Wolf: Mr. Examiner, my question was, were you advised by the Enforcement Attorney to make this change in procedures; otherwise, you might be in violation of the Civil Aeronautics Act?

Now, that is a question and it is simple. Was he so advised or was he not?

Mr. Gaudio: You can state that yes or no, Mr. Barulich.

Examiner Walsh: Let's have an answer, Mr. Barulich. Yes or no should suffice.

(Testimony of Matthew J. Barulich.)

The Witness: I am trying to get back to the Enforcement Attorney's conference with me.

Mr. Stowell: Mr. Examiner, I think the question is simple. Did the Enforcement Attorney advise you to change your method of reporting to the State Tax authorities, so as to be in compliance with the Civil Aeronautics Act?

Is that your question, Mr. Wolf, substantially?

Mr. Wolf: Substantially.

Mr. Stowell: That is susceptible of a very simple answer.

Mr. Gaudio: Answer yes or no, Mr. Barulich.

The Witness: It is no, so far as the association is concerned. [558]

Q. (By Mr. Wolf): Did the Enforcement Attorney advise you that the entire amount received by you—that is, the 55 cents—should be set up as a hauling and terminal expense rather than as a consolidation expense?

A. We were advised that certain expenses should be shown as consolidation expense. Other expenses should be shown for whatever they are.

Mr. Wolf: That is all. Thank you, Mr. Barulich.

Mr. Stowell: Mr. Examiner, in order to get all matters in the executive session that should properly be so, there are two matters that should be mentioned.

One is the certain information which Mr. Reynolds testified on direct, which was entered into the record, except the amounts paid to Mr. Barulich.

(Testimony of Matthew J. Barulich.)

At this time I believe that the amounts should be entered into the record, and without objection from counsel, Mr. Examiner, I believe this information should be entered as the testimony of Mr. Reynolds, as I recall.

Examiner Walsh: You are offering an exhibit at this time? Do you want to read it in?

Mr. Stowell: It should be read, and I will make it available to the reporter to copy.

Examiner Walsh: How do you want it handled?

Mr. Stowell: It should be copied in, as the confidential [559] extension of Mr. Reynolds' testimony when the earlier portion was copied in as his testimony.

Examiner Walsh: The other is public, and this will be in executive session. Very well.

(The information referred to is as follows.)

Reynolds Bros. Checks Payable to John C. Barulich, Bank of America, Redwood City

Number	Date	Amount	Endorsed
1565	12/22/49	$ 72.00	Barulich
1592	1/ 4/50	73.25	Barulich
1630	1/14/50	21.00	Barulich
1645	1/20/50	40.00	Barulich
1670	1/31/50	150.00	Barulich
1719	2/15/50	130.90	Barulich
1745	2/24/50	138.30	Barulich
1759	3/ 6/50	120.80	Barulich
20	3/22/50	64.60	Barulich

(Testimony of Matthew J. Barulich.)

Number	Date	Amount	Endorsed
1801	4/ 2/50	88.55	Barulich
1816	4/12/50	146.55	Barulich
1923	5/16/50	99.10	Barulich
1946	5/27/50	42.60	Barulich
1965	6/ 5/50	63.90	Barulich
2004	6/16/50	73.95	Barulich

* * *

Mr. Stowell: The second item, Mr. [560] Examiner.

Mr. Barulich, did you bring with you your file on the Cereghino letters?

The Witness: I believe I did, yes.

Examiner Walsh: Off the record.

(Discussion off the record.)

Examiner Walsh: On the record.

Mr. Wolf: The question I asked off the record was if this is still part of the executive session.

Examiner Walsh: I believe I stated before that this matter was brought up in the public part of the hearing, as I recall, and I think possibly should be handled in the public part of the hearing.

If we are about to leave the executive session at this particular time, as I assume we are, there being no more questions of Mr. Barulich, there is just one thing that I am disturbed about, going back to this question of the three per cent tax on the 55-cent item.

(Testimony of Matthew J. Barulich.)

The testimony we had, as I recall, was that there was a 60 cents charge which covered transportation charge, plus a consolidation charge.

Now, if a shipper hauled his own products, his own flowers to the airport, that charge was 30 cents and five cents. I am wondering why a transportation tax would have to be charged on that very same item, if this California law does impose a transportation tax as such. [561]

Mr. Gaudio: I might offer in response to that, Mr. Examiner, that the taxing authority will take the agreement between the contract trucker and his principal, and if that agreement establishes a division of a sum specifically allocated to trucking as a carrier, such as Airport Drayage is performing, that sum will be the sum used for tax purposes. And that procedure continued until this change in this accounting procedure.

Now, under that latter procedure, where it is definitely established—and incidentally, because of the suggestion of the Enforcement Attorney—that the only charge properly allocable to consolidation is five cents, the conclusion inescapable to the taxing authorities, is that the 55 cents must be for trucking, and he is stuck with a three per cent tax on it. That is essentially the problem.

Examiner Walsh: Will a charge of five cents cover the consolidation services?

Mr. Gaudio: That is a problem for the Board, and experience only will develop if in fact it will.

Mr. Stowell: Mr. Examiner, I was just thinking,

(Testimony of Matthew J. Barulich.)

how much does Mr. Barulich charge on a direct shipment which, for example, is tendered to Airborne?

The Witness: Right now I can charge anything I please on it.

I will tell you what we do charge. If our truck is out [562] right now picking up one box for Airborne, they pay $1.03 minimum. It has nothing to do with Bay Area. And for every shipment we are going to bring in to Airborne it is going to be $1.03 minimum. It may be charged per box, or it may be charged per pound, but we try to use the same set of rates and charges for surface work as the air carriers have listed within their tariff.

Examiner Walsh: I now declare the executive session at an end, and the public portion of the hearing will reconvene.

* * *

Examiner Walsh: Come to order.

Mr. Stowell: Mr. Barulich, how do you charge on a direct shipment on a box which is not consolidated?

The Witness: We have the authority from the Board of Directors to keep the charge uniform.

Now, when we make a direct shipment, as I believe I stated in the prior testimony, in some cases we have to make that air bill copy, and I brought along today, because the Examiner questioned yesterday how we could differentiate between a straight shipment as against consolidations, these manifests here, copies of which I took off of our file to give

(Testimony of Matthew J. Barulich.)

them to you so you could look them over, so you would know exactly what it is we have in mind.

May I give these to the Examiner? [563]

Mr. Gaudio: If it is in answer to this question.

The Witness: Yes, it is relevant to this.

Now, this particular shipment on top here is a shipment to Boston. This might either be brought to the terminal or deposited at the air carrier. In this case the party here took it over to the carrier. We had to make an air bill in the office covering this movement. The charge on that is 35 cents a box, terminal charge.

Now, if I may turn this one over I will give you a better example. This is destination airport, Pittsburgh. We don't have a consolidation there. This party wants this merchandise to go directly to Pittsburgh, so a straight bill would be cut on that.

We can find a better example as we go through here. This calls for Slick, direct to each of these two points. In this case there will not be a consolidation performed on either one of these two shipments, but there will be a straight air line bill cut in our office, you might say in lieu of consolidation service.

Examiner Walsh: Would the air line bill cover both?

The Witness: No, separate for each one.

Examiner Walsh: How do you distinguish between when shipped consolidated and when shipped direct?

(Testimony of Matthew J. Barulich.)

The Witness: If these were consolidated shipments the shipper would insert in the allocated space here for [564] destination airport the break bulk station he wanted to use as far as the air carrier is concerned, and then if these ultimate consignees are not located at the break bulk point he chooses a beyond routing, which is inserted out at the far right. Now, he could put in here a truck line of some type, a rail carrier, a specific train number, another air carrier beyond, or he might check in this column here, indicating a preference for rail service.

As we go through these, here is one for Miami, Florida. There is no consolidation to a point like that, unless they had Chicago, or St. Louis on a beyond carrier.

Now, we know in the morning when Western Wholesale was called on this particular booking they said they had so many boxes going to this point, and they are certain sized boxes, and they wanted a booking on a flight that goes directly in there. In this case it happened to be Flight 918 of American Air Lines, that leaves in the morning. The air bill is cut in the office also. It gives you all the information we need to make up the air bill.

As we go along here you will see that this shipper specifies Indianopolis direct by a carrier. Well, that is an order to put it out that way rather than consolidation.

This is the same condition—Boston direct by Tiger.

(Testimony of Matthew J. Barulich.)

And when we get down here, it shows one going to this point, and specifies the carrier. That is an order. That is [565] not consolidated service. That is a straight billing service. Now, a bill is cut on this carrier's forms and tendered to the carrier, copy of which is returned to this shipper with all extended charges on it.

I just picked a few of these at random, because you had asked the question, and I wanted it clarified in your own mind.

Here is a case where he wanted to prepay this shipment to this break bulk point. He shows the break bulk point. He wants to prepay it. So there is a straight shipment, to be accomplished by any one of four carriers. If we are having a space problem that night we will perhaps use United, or possibly Slick or the Tigers, or even possibly American to that point.

This one here, you see how definite they are on that. There is no other service they want. So the air bill is cut accordingly.

Examiner Walsh: Off the record.

(Discussion off the record.)

Examiner Walsh: On the record.

The Witness: There are many factors taken into consideration on our rate schedule for performing this type of work. One of the big factors is in many cases these shipments are going to make a passenger flight, which actually you might call a scheduled departure, and it takes [566] an expedited service.

(Testimony of Matthew J. Barulich.)

Perhaps I could divide this, and in 50 per cent of the cases one-half of the shipments involved will be covered with an air line air bill that the shipper has made to help us, while on the other hand they are not. And we have to stop and make them—a delay in time and extra cost in trucking back and forth.

So as an overall picture, they felt until such a time as the cartage company in this case is breaking even, this is the charge. Now, this charge is not set to such a point that it can never be adjusted. It is up for adjustment now.

But to clarify the point here, our charge is identical, as authorized by the Board of Directors, for a straight shipment or a consolidated shipment.

Is that clear?

Mr. Stowell: I believe Mr. Barulich should also continue with his discussion about the manifests when there is no indication on the manifest that a shipment is to go direct, as to what happens.

In substance, I would like to have him repeat what he told you off the record, Mr. Examiner.

The Witness: I believe it was in regard to the booking arrangement. I was talking about a specific firm there, when I said that when they are calling for space reservations in the morning they will tell us specifically what merchandise [567] it is that they have that is going to go direct, and space is reserved in accordance with that request.

Mr. Stowell: Didn't you make a general statement thereafter that if for any reason it can't make

(Testimony of Matthew J. Barulich.)

that flight you either consolidate or you dispose of the merchandise by tendering it to an air line in accordance with the objectives of efficiency and saving time?

Mr. Gaudio: I don't remember the witness making that statement.

Examiner Walsh: I think that is getting beyond my question. My question related only to how Mr. Barulich could determine from a manifest received from the shipper whether it should be shipped direct or consolidated with other shipments. In other words, I believe the point you raised, Mr. Stowell, was explained yesterday.

Mr. Stowell: Mr. Examiner, don't you feel that the statefents he made, which could be verified by the several persons present here, should go into the record? I heard it very specifically.

Mr. Gaudio: I object to counsel calling Mr. Barulich in general session—I assume we are in general session now—and asking him any questions he wants to. Mr. Stowell purported to use a form of a statement which he believed Mr. Barulich made. I don't think Mr. Barulich made it in that form, or used those words. I don't mean to imply that you [568] should not examine him on that point.

Mr. Stowell: Mr. Examiner, I move that you direct Mr. Barulich to repeat for the record substantially the words which he used to you during the off-the-record discussion.

Mr. Gaudio: I object.

(Testimony of Matthew J. Barulich.)

Examiner Walsh: Most of them are already on, except with respect to this one manifest that Mr. Barulich referred to, and that is the time when I asked the reporter to stop taking notes.

The Witness: I can clarify his question very easily.

Mr. Gaudio: He hasn't asked a question. I don't know what the statement was, don't know whether it is material, don't know whether the Examiner is interested in it.

Mr. Stowell: I merely would like to have Mr. Barulich repeat for the record the statements he made to the Examiner off the record, which were substantially in discussing the manifests one of the manifests that had a direction on it "Ship Tigers for sure," and you said there was a manifest where the shipper really wanted to make sure it goes via that carrier, and then you said that in some instances where for some reason or other space difficulties arise on the carrier, you would tender it to any other carrier, keeping in mind time and efficiency and cost—or substantially those words. [569]

The Witness: That is true. I would like to add that there was one referring to a shipment to Philadelphia, where the account did not specify a carrier, and I said that it could go by any one of four. We could then use our own discretion and judgment, bearing in mind certain factors—namely, efficiency, speed, cost, and space allocation. We had that little fluctuation.

(Testimony of Matthew J. Barulich.)

Mr. Stowell: That is what I want in the record.

Examiner Walsh: You got that on the record yesterday, I feel pretty sure of that.

Mr. Stowell: That satisfies me.

Mr. Gaudio: There is one other element, I think in answer to your question, that I would like to ask Mr. Barulich.

In these directions that are contained on the manifests which have just been referred to, is it essential that the driver of the truck be aware of those routing instruction forms of the shipper?

The Witness: Yes, by all means. That is one of the toughest parts of this business, in sending a green man out. You can't send what we commonly classify as a truck driver out to pick up flowers. He gets out to accounts, and he is tendered shipments such as those in that file, and he has to follow very closely the instructions. He has to check them onto the truck. He has to make arrangements when he is [570] loading the truck for efficiency in off-loading, and at the proper carrier. It takes quite a bit of telephone communications to central headquarters, such as the office, to find out what arrangements, if any, are made to accommodate shipments of this type.

Usually, if they are booked and space reservations taken to cover them, the men go out with a pickup sheet that has a breakdown on it showing the amount of boxes booked, and to where space reservations have been made.

(Testimony of Matthew J. Barulich.)

Examiner Walsh: I think we have enough on that subject, gentlemen.

Mr. Stowell: Will the examiner hear any more tomorrow?

Examiner Walsh: I think we have enough on that point.

Mr. Wolf: Could Mr. Barulich be asked to bring those manifests that you are examining back at the next session?

Examiner Walsh: Yes, I believe you do have cross-examination on that point.

Mr. Wolf: Thank you.

Mr. Stowell: And I would like to ask that Mr. Barulich bring the Cereghino file with him.

The Witness: Are you going to return it to me?

Mr. Stowell: Yes, here it is. Will you bring that in tomorrow?

The Witness: Yes.

Examiner Walsh: Do you have more [571] examination?

* * *

JOHN C. BARULICH

was recalled as a witness for and on behalf of the Enforcement Attorney, and, having been previously sworn, was examined and testified further as follows:

Further Direct Examination

By Mr. Stowell: [577]

* * *

Q. What happens if there is any difficulty in

(Testimony of John C. Barulich.)

the collection? With whom will the consignor communicate?

A. The consignor in the past has communicated with both Bay Area and the direct carrier. In some cases, if the shipment was tendered to the Bay Area outlet, such as on these manifests, he might not be in a position to know by which carrier it moved, so he would have to justify the movement, and if requested, the Bay Area Office might have to follow up the C. O. D. collection in behalf of the consignor.

Q. On Claims, Mr. Barulich, have there been any occasions when a consignor here would contact you with respect to a direct shipment which moved over the Bay Area service? A. Yes.

Q. Did you follow the same procedure for such shipment as you did for a shipment which moved as part of a consolidated shipment?

A. No, you couldn't because you wouldn't have the same records. The general operation, if a claim was instituted, would be practically the same in both cases, with the exception that our Bay Area records might not have original documents, such as the air bill, manifest, and what have you.

Q. I would like to go back once more to the basic procedure. As I recall, I previously examined you about direct shipments insofar as the manifests were concerned. What happens if, for example, Western Wholesale calls you in the [579] morning, and they tell you that they have a number of boxes going to

(Testimony of John C. Barulich.)

various destinations? With respect to some of the boxes, will they indicate that they are going straight, if they want those boxes to go straight?

A. In this manner they might do that. All the shippers are acquainted with the consolidation points. If they have a shipment going to other than a consolidation point and they want air service to that point, they will indicate it in the booking—such as three boxes for Boston, one for Connecticut. How should I route that? Maybe the Connecticut box will go in the New York consolidation, and the three boxes to Boston will go direct to Boston.

Or, there may be three boxes to Miami, and they may say they want that on Flight 918, so we record it that way and reserve space in accordance.

Q. Suppose that a shipper indicates a consolidation point to you and it turns out that you don't have enough boxes to be consolidated to that point; then, what do you do?

A. I believe we covered that.

Q. You will ship that on direct?

A. It all depends on the type of merchandise. The general instructions we have from the particular shipper such as the perishable nature of the commodity, whether it would withstand a longer transit time. By that I mean, being possibly put into a consolidation at a further station, which may take [580] more time, and then back hauled or some such arrangement. Or, in the case of a high valued shipment, cut flowers, that would usually go direct.

(Testimony of John C. Barulich.)

We have a working policy arrangement with each one of the various shippers, and they just state their request. This holds true, possibly, for most of the consignment houses. They ask us that when we might end up in our accumulating consolidations if their box should happen to be a one-box lot going to a break bulk point, some of them have asked to be notified so that they could either change the consignee, thereby putting it into a consolidation station, or be given the privilege of rerouting it to another break bulk point. Or, in some cases, we have open authority to route all of these shipments into a consolidation rather than a direct shipment, and pay that excessive high charge.

Q. I show you Exhibit No. 295, Enforcement Attorney's Exhibit 295, which has been previously admitted in evidence. When this manifest is turned over to your driver, what portions of that manifest are filled in?

A. In this manifest before us, the portion filled in by the shipper is only the typewritten part indicated here. Anything written, such as these charges here, which are advance charges, such as this designation for grouping, this mark here, the wording here, and this rate one five one naught here, the "straight" indication here, the dimensional weights, those have [581] been done by Bay Area personnel.

Mr. Stowell: Mr. Examiner, is it agreeable with you to temporarily interrupt Mr. Barulich to put on Mr. Swanson for a few moments, and then we can send him home?

(Testimony of John C. Barulich.)

Is that agreeable with you, Mr. Gaudio?

Mr. Gaudio: That would be all right.

Examiner Walsh: Very well. [582]

* * *

Q. (By Mr. Stowell): In your opinion, Mr. Barulich, as you understand your arrangements between yourself and the Bay Area group, do you receive any compensation for your activities as Executive Secretary?

A. As direct salary or to cover the services of Executive Secretary, by check or by any other means, from Bay Area?

Q. In any form.

A. No, other than that described in that Agreement.

Q. As you receive the arrangements between yourself and Bay Area, do you receive compensation in any form for your services as Supervisor of consolidation work?

A. Only what is covered in that Agreement; nothing other than that.

Q. Mr. Barulich, did you bring with you the folder on the Cereghino letters?

A. Yes, I did.

Q. Mr. Barulich, did you, on November 2, 1951, write a letter to Mr. Edward Cereghino, 45 West 28th Street, New York 1, New York, as follows:

"Dear Ed:

"Now that your busy season is approaching, we, too, are going to add a little work for your already busy day.

(Testimony of John C. Barulich.)

"Ed, we are having a hell of a time in Philadelphia. Our [590] present trucker, who is also the trucker for Slick, is not doing a good job. He lets the flowers lay for a day before he comes out to the airport to get them. Airborne gets his delivered as soon as the plane hits. Airbone, as you possibly know, has Bernacki doing his work for him. When I was back there in June, I had quite a talk with Bernacki. He was ready to take us on, but then at the last minute he told me it would have to be approved by Airborne. Of course, I told him not to bother, to take his time to contact Airborne.

"We have had several routing orders against our service into Philadelphia. Consequently, we do not look for help in this respect. Do you think you can do the following job for us: Contact the big florist houses in Philadelphia, and see if they can put some pressure on Bernacki to handle all the flowers in Phily. In that manner, he will have to handle ours. His service is by far superior to our present trucker. Our people have written to some of their outlets and asked for their support, but as yet no results.

"Our Board of Directors has approved any expenditures you will undoubtedly have in doing this contact work for us.

"The Tigers have a trucker, Shannahan Trucking Company, who has bid in for our business. Our problem is the week-end shipping. Most of the union truckers will not come out over the week end, and we lose one to two days.

(Testimony of John C. Barulich.)

"I would like to hear from you, and any comments you may [591] have regarding the Phily area.

"With best personal regards, I remain."

Mr. Barulich, would you please answer my question? Did you write that letter to Mr. Cereghino on November 2, 1951?

A. Is that the date of that letter?

Q. Yes. I will show it to you.

A. I wrote the letter on November 2, signed by Consolidated Flower Shipments, Inc., John C. Barulich, Executive Secretary, yes.

Q. On November 23, 1951, did Mr. Edward Cereghino write you a letter addressed as follows——

Mr. Examiner, is it agreeable to have the Reporter just copy this into the record?

Examiner Walsh: As long as Counsel has been given an opportunity to read it.

Q. (By Mr. Stowell): Will you adopt as your testimony the copy which the Reporter will make in lieu of my reading it?

Mr. Gaudio: We have no objection to transcribing this letter into the record, if that is the purpose. I assume this is to be followed by Mr. Cereghino's reply.

Examiner Walsh: You heard the other one read, did you not, Mr. Wolf?

Mr. Wolf: Yes.

Mr. Stowell: Mr. Gaudio, do I have the same

(Testimony of John C. Barulich.)

agreement on [592] these two documents, that they be copied into the record?

Mr. Gaudio: No objection.

Mr. Stowell: Mr. Examiner, for the record, I would like to identify these various letters as follows, some of which is in repetition of what I said earlier:

The letter of November 2, 1951, signed by Consolidated Flower Shipments, Inc.-Bay Area, John C. Barulich, Executive Secretary.

The letter of November 23, 1951, signed by Edward Cereghino, to Consolidated Flower Shipments, Inc.-Bay Area.

Two letters, both dated December 8, 1951, signed by Edward Cereghino, one letter of which was addressed to Consolidated Flower Shipments, Inc.-Bay Area, and the other of which was addressed to Mr. Tony Bernacki and Peter A. Bernacki, 222 Spring Garden Street, Philadelphia 23, Pennsylvania.

(The letters above referred to are as [593] follows.)

"Nov. 23, 1951.

"Consolidated Flower Shipments, Inc.-Bay Area,
"San Francisco Municipal Airport,
"South San Francisco, Calif.

"Dear John:

"Your letter of the 2nd inst. explaining your problems with the Philadelphia's deliveries and

(Testimony of John C. Barulich.)

asking for my help in that connection was duly received.

"I regret that I didn't get a chance to write you any sooner, however, I want you to know that I have spoken (over the phone) to several of the Philadelphia wholesalers and told them what they should do to obtain better service there and get the benefits of the cheaper rates on Bay Area Consolidation, as compared to the other outfit. They all said they would see what they could do but other than that, at this time, I can't tell you.

"This coming week I will manage to go to Philadelphia and spend 2 days there. I expect to call on Bernacki myself and see if I can't sell him the idea of handling all of the California's flowers shipments, along the same lines that Cosmar is doing here. This would certainly be in his own interest and I do not see why he shouldn't do so, unless Airborne have him on their payroll as an employee.

"I'll see what I can work out and what other angles can be worked, if this fails, and advise you as to what results, or recommendations I'll have to make. [594]

"Please excuse me for not not writing sooner. I had intended to go to Philadelphia before this, but I couldn't make it.

(Testimony of John C. Barulich.)

"Glad to hear that the CAB deal is winding up and that matters look O.K. for Bay Area.

"Kindest regards and best wishes,

"/s/ EDWARD CEREGHINO."

* * *

"December 8, 1951.

"Consolidated Flower Shipments, Inc.-Bay Area,

"San Francisco Municipal Airport,

"South San Francisco, California.

"Dear John:

"With further reference to your letter of November 2nd and my letter to you of November 23rd:

"As Jim Bonaccorsi undoubtedly reported to you, some 15 days ago I called on the phone in Philadelphia Mr. Tony Bernacki and had a long conversation with him over the matter of the deliveries into that City. Mr. Bernacki had promised to let me know something definite within a few days, however, up to this writing, nothing has been heard from him. I have therefore sent him today a letter, copy of which is attached herewith. He might have contacted you direct, since I had given him full details, etc., but if he had done so, I imagine that you'd have informed me. At any rate, I intend to

(Testimony of John C. Barulich.)

go to Philadelphia and call on him, probably next week if I can make it.

"Kindest personal regards.

"Sincerely yours, [595]

"/s/ ED CEREGHINO."

* * *

"December 8, 1951.

"Mr. Tony Bernacki,
"Peter A. Bernacki,

"222 Spring Garden Street,
"Philadelphia 23, Pennsylvania.

"Dear Mr. Bernacki:

"Two weeks ago I had a conversation over the phone with you during the course of which it was discussed that it was my pleasure as well as the Philadelphia's Wholesale Florists that you should handle the pick-up and deliveries of their Flowers shipments coming into Philadelphia on the Consolidated Flower Shipments, Inc.- Bay Area, San Francisco, Cal.

"It was my understanding that you were interested in the operation and you promised to look into the matter and advise me as to what your decision would be.

"Inasmuch as I haven't as yet received a word from you one way or the other, I am still unable to report to my Principals, the Golden Gate Wholesale

(Testimony of John C. Barulich.)

Florist, Inc., in San Francisco, who are one of the members of the C.F.S., Inc.

"I would greatly appreciate hearing from you on this subject at the earliest possible convenience.

"Awaiting your advises, I remain

"Very truly yours, [596]

"/s/ EDWARD CEREGHINO."

* * *

Q. Amling Floral Supply?

A. Amling Floral Supply, yes.

Q. Mr. Barulich, do you keep any record of the shipments made by various members throughout a period of time, such as a year? A. No.

Q. Do you, or, in your knowledge, the Board of Directors examine shipment records of Bay Area to determine whether the persons listed on a membership roster are in fact making use of the Bay Area service?

A. I have to report as Executive Secretary to the Directors that such is being done under my supervision. In other words, I am instructed by the Board of Directors to see that no non-member ships with Bay Area. That is my responsibility to the Directors.

Q. Can you tell me whether at the time of the preparation of this roster, which is dated February 9, 1951, you made any determination as to whether any of the persons listed on this roster in fact were

(Testimony of John C. Barulich.)

or were not shipping via Bay Area for any recent period prior thereto?

A. The only determination I made in computing and compiling that roster was whether or not they were members in good standing. By that I mean did they pay their dues. There was no fact entering into the picture of whether or not they used the privileges. [610]

Q. Is it true, Mr. Barulich, that at the time you prepared this roster the California Floral Company had not used the Bay Area service for at least a year?

Mr. Gaudio: Who?

Mr. Stowell: The California Floral Company, if you know.

The Witness: I can't say that they hadn't used it for a year, but I can say they possibly were not using it at the time that roster was developed.

Q. (By Mr. Stowell): The Boodel Company?

A. That I cannot answer, because that has been and off and on arrangement.

Q. Davidson and Matraia?

A. No, they were not using it.

Q. Kearns Floral Supply?

A. That is an off and on case. I do not know.

Q. Wong Wholesale Florist?

A. He wasn't using it at that time.

Q. Stonehurst Nursery?

A. I don't believe he was using it, either.

Q. Amling Floral Supply?

(Testimony of John C. Barulich.)

A. He was on and off. I don't know if he was using it at that time or not.

Q. Mr. Barulich, is this document which I now show you the document which you made available to me as describing the [611] members in good standing as of this date, with the dates that members were dropped by the Association?

A. I prepared by adjustment and amendment on this list with you in my office, and included certain dates and firms. Yes, I did.

* * *

(The document above referred to was marked for identification as Enforcement Attorney's Exhibit No. 391.) [612]

* * *

Q. Is it true that for a substantial period of time, six months or longer, Bay Area owned in its own name no office equipment other than the fact that it had the use of these few items which you have just indicated?

A. By document, I would say they didn't own anything, but they had the use of a desk that was furnished by the landlord.

Q. Mr. Barulich, can you tell me, in your knowledge, has any application for membership in Bay Area ever been refused?

A. To my knowledge, no.

Q. When was the first occasion when a member was expelled from Bay Area?

(Testimony of John C. Barulich.)

A. To my knowledge, the Board of Directors at the General Membership Meeting of 1951 authorized me as Executive Secretary to bill all members for annual dues. If the dues were not paid, whether or not the member was active, he forfeited his membership, and I was to notify him of such, and I was to report to the Directors as to the dues payments and those members that might be expelled for nonpayment.

Q. Is the October 24, 1951, date shown on the membership roster previously marked for identification the first time that a member has been expelled from Bay Area? [618]

A. To my knowledge, yes.

Q. Are you aware that members of Bay Area used the services—and by "services," I mean consolidation services—of other firms than Bay Area?

A. I am aware that some of the members have, or have in the past.

Q. Are those same ones still doing so now?

A. I believe there are some isolated instances where they do.

Q. Can you tell us which firms, if you know, use——

A. I do. Western Wholesale does. I might qualify my answer on this basis. You said used the consolidation services of some other type of carrier, or their services—period—or both?

Q. Use either consolidation pick-up, or any other service incident to the tendering of a shipment

(Testimony of John C. Barulich.)

in California and receipt thereof on the East Coast.

Mr. Gaudio: If you know.

Q. (By Mr. Stowell): If you know.

A. The John Nuckton Company, the William Zappettini Company, the Golden Gate Wholesale Florists, the A. G. Enoch Company.

I don't think of any others at the moment. [619]

* * *

Q. (By Mr. Stowell): Mr. Barulich, did you make a trip to the East Coast last year?

A. Yes, I did.

Q. Did you call upon the following persons: Fetterman, in New York City? A. No.

Q. Rutig, Gaston and Costa? A. No.

Q. Linwood Wholesale in Detroit?

A. Yes.

Q. What did you discuss with Linwood Wholesale in Detroit?

A. I discussed a letter that Linwood Wholesale had sent to one of our members, wherein they requested certain information as to just what Bay Area was. This letter had to do with a prior conference they had with Mr. McPherson of Airborne, who, according to this letter, stated that Bay Area in realty was Zappettini, and that the Rule 65, which covers the collect distribution and the charge pertaining to it, was merely a subterfuge small-time grab.

I was sent there also in behalf of Mr. John Nuckton of the John Nuckton Company, to speak with Mr. Potter. Prior to my arrival in Detroit, Mr.

(Testimony of John C. Barulich.)

Nuckton had sent a letter to this [624] gentleman advising him of my coming there to discuss various matters, one of them being a trucking arrangement to cover their flowers from the airport.

Q. Just the Nuckton flowers only?

A. No, the Nuckton flowers and Bay Area flowers into that area. At that time, we had no contract agency.

Q. Did you call on the Detroit Flower Growers in Detroit? A. I did.

Q. What did you discuss with them?

A. All calls other than the Linwood call were just a "Hello" call, you might say, just to meet them.

Q. Is the Detroit Flower Growers a consignee of Bay Area members, to your knowledge?

A. Bay Area members do ship to that house.

Q. Did you call on the Detroit Florists' Exchange? A. Yes, I did.

Q. Is that company a consignee of Bay Area members? A. Yes, it is.

Q. What did you discuss with them?

A. Just general.

Q. Did you call on the Amling Store in Detroit?

A. I believe I did.

Q. What did you discuss with them?

A. Just a "Hello" call, general. I might add that in [625] Detroit one party, like the Detroit Florists' Exchange, took me over to the Detroit Flower Growers and introduced me as John Barulich who is associated with the Bay Area group, as

(Testimony of John C. Barulich.)

they called us, and they all had several comments and questions regarding Airborne's charges, and they asked me to explain them. And, wherever I could, I did.

Q. Did you also explain the Bay Area procedures?

A. When I was asked about them, I gave answers, yes.

Q. Did you call on the Floral Supply Company of Detroit? A. I believe I did.

Q. Is the Floral Supply Company a consignee of Bay Area members?

A. If my memory serves me correctly, I believe that name has been changed, but, when they operated under that name, Bay Area members did ship to them.

Q. What did you discuss with the Floral Supply Company? A. The same, general.

Q. Did you call on the Michigan Cut Flowers Company?

A. I don't remember that name. I might have.

Q. Did you stop over in Kansas City?

A. Yes, I did.

Q. Did you call on Stuppy?

A. I was taken in and introduced to Mr. Stuppy, yes.

Q. What did you discuss with Mr. Stuppy?

A. When I was there, it was in relation to inspecting [626] shipments of members as to the condition when they arrived.

I might add that that was one of the items I was to check with the trade; the general condition of

(Testimony of John C. Barulich.)

arrival, as to air carriers' handling and co-operation, and the actual condition of the flowers, and boxes, and icing, and so forth, and, in Kansas City, I happened to be there when several boxes were brought in that were given to this account on a salvage basis because of the fact that they were so damaged in transit they couldn't be forwarded to the ultimate named consignee on the air bill. [627]

* * *

Mr. Wolf: Mr. Examiner, I would like to interpose the usual objection here, that the answer at present is not responsive to any question. It is a discussion of what goes on at St. Louis. The question was what he discussed with a certain gentleman.

Mr. Stowell: Let him continue, Mr. Examiner.

Examiner Walsh: Continue, Mr. Barulich.

The Witness: Of course, we talked about the subject of damage, and they went into great length about schedules, and so forth, and felt that they weren't getting service that they should get. They wanted to know what we were doing as regards our group shipping into an area such as that. That was quite a long discussion on that.

Q. (By Mr. Stowell): Did you call on Mr. Geddes in St. Louis?

A. I am not sure. I don't believe I did.

Q. Did you visit in New York?

A. Yes, I did.

Q. Did you call on Mr. Cereghino?

(Testimony of John C. Barulich.)

A. I had a visit with Mr. Cereghino while I was there. He called on me.

Q. What did you discuss?

A. He had an interest in Bay Area's operation, inasmuch as [628] the dollar and cent picture was involved, and it is my understanding that prior to Bay Area's inception he was trying to formulate a plan of a receiver's type association to do the same thing that Bay Area is doing here. He wanted to do it back there. And he had several questions regarding the prehearing conference, and wanted to know if there was anything he could do in behalf of himself as a sales representative for flower shippers, and in behalf of the industry in general, if he could help in any way. We had quite a lengthy discussion regarding those facts.

Q. Did Mr. Cereghino give you names of flower firms in New York City? And suggest that you call upon them? A. No, he did not.

Q. Did you call upon any other flower firms in New York City?

A. I didn't call on any flower firms in New York City.

Q. Did any flower firms call upon you, other than the names Fetterman and Rutig, Gaston & Costa, which I have mentioned?

A. They didn't call on me.

Q. I mentioned those as flower firms in New York.

A. To my recollection, I called on no flower firm

(Testimony of John C. Barulich.)

in New York, and no flower firm in New York called on me.

Q. In your discussions with Mr. Cereghino, did you discuss with him about the possibility that he might mention Bay Area in his solicitation of sales of flowers in New York and on the East [629] Coast? A. No. [630]

* * *

Q. Mr. Barulich, do you have with you your conditional sales contracts respecting the trucks which you purchased? A. Yes.

Mr. Stowell: Mr. Examiner, I have before me conditional sales contract, Purchaser John C. Barulich, dated October 15, 1951. I would like to have the witness read from the purchaser's statement.

Will you please do so, Mr. Barulich?

The Witness: I will quote the purchaser's statement, which is printed by someone, and signed in the hand of John C. Barulich.

Q. (By Mr. Stowell): Is that, in fact, your signature?

A. This is my signature here. This is not my printing.

Q. But you did sign it. Is there a certification?

A. This says, "Purchaser sign here."

Q. And your signature is underneath the statement: "For the purpose of securing credit, I, or we, make the above representations and request the placing of insurance coverage and the financing of

(Testimony of John C. Barulich.)

insurance premiums as shown in this statement of transaction." [636]

Would you please read from that statement, Mr. Barulich?

A. It says, "Employed by," and it is filled in, "Self, Airport Drayage Company."

The form then says, "Address," and it is filled in, "1717 Belmont."

The form says, "City," and it is filled in, "San Carlos."

The form says, "Years," and it is filled in, "One and a half."

The form says, "If self-employed, state kind of business," and it is filled in, "Air freight forwarding."

Q. Thank you. Mr. Barulich, I am going to ask you some questions about the disbursements made by Bay Area, and you may care to refer to your ledger book. They will be of a general nature, however.

Are claims settlements disbursed by Bay Area on Bay Area's checks? A. Yes.

Q. C.O.D. collections?

A. They are not handled through Bay Area. They are handled direct with the member shipper. The contract with an agent, if it is consolidated, specifies the C.O.D. remittee remittance will be made directly to the shipper as shown on the manifest, and, if it is a straight shipment, Bay Area has no connection with it other than a trucker to the airport.

(Testimony of John C. Barulich.)

Q. Supposing it is a consolidated [637] shipment?

A. I said, if it was a consolidated shipment, the break bulk agent is contracted to remit directly to the shipper on the manifest. That would be the member shipper.

Q. How long has this been in effect?

A. I have never known there to be any other form of procedure.

Q. Mr. Barulich, does check No. 201 of the Bay Area checkbook show a C.O.D. payment to William Zappettini Company? A. Yes, it does.

Q. Would you care to explain your earlier testimony on that?

A. Yes. If my memory serves me correctly, this check was made out to Bay Area instead of Zappettini, so it was banked in the Bay Area account and withdrawn in favor of William Zappettini Company, just as a clearing house, you might say, in that case. It refers to Air Cargo Terminal, which would be the agent in Kansas City. It refers to the air bill that carried that particular C.O.D., and the date.

Q. I show you check stub for check No. 204, dated May 8, 1950, being described as C.O.D. collections, Golden Gate Wholesale. Would you explain that, please, and also check stubs Nos. 205 and 206.

A. Check No. 204 covers the payment of C.O.D. collections in behalf of the Golden Gate Wholesale in the amount of $409.94. Check No. 205, issued

(Testimony of John C. Barulich.)

May 8, 1950, covers C.O.D. collections [638] made payable to the California Floral Company, in the amount of $104.45. Check No. 206, issued June 16, 1950, covers the payment of a C.O.D. collection to William Zappettini Company, subject, shipment in question, moved on Tigers' air bill 49894, in the amount of $41.18. Check No. 208, issued July 26, 1950, to the California Floral Company, covering their C.O.D.'s, moving on Slick air bill 1380, in the amount of $11.00, and Tigers' air bill 39358, in the amount of $33.50.

Payment received from Wings & Wheels, made payable to Consolidated Flower Shipments, and deposited check No. 208 written in the amount of $44.50.

Q. Has Bay Area made checks payable to its members involving over-charges by air carriers?

A. Yes.

Q. Did Bay Area make a check payable to John C. Barulich covering an advance on his expenses for his trip to Washington, D. C.?

A. Yes, they did.

Can I refresh my memory?

Q. Yes.

A. Yes, that is the truth—check 226.

Q. Did Bay Area issue a check for purchase of manifests from the Sunset McKee Company?

A. Yes, they did.

Q. Did Bay Area issue a check for payment of

(Testimony of John C. Barulich.)

attorney's [639] fees for services performed for Bay Area? A. Yes. [640]

* * *

Q. Mr. Barulich, how do you know which carrier's air bill to prepare? Suppose, for example, there are four carriers going to this particular break bulk point?

A. During the course of the day, after we have called or have received calls from the various shippers, this space reservation is made by a certain carrier. The fact that four carriers serve one point doesn't necessarily give you an option to use any one of the four; but, with space being a critical problem, you have got to jockey for position, you might say, to get the merchandise out.

Now, if you have got a big consolidation, you may have to give it to one carrier here and then take three small ones and give them to carriers over here, to equalize the distribution of your tonnage. There are many factors taken into consideration on that, such as one carrier performs the best service.

Now, these are the factors that we are governed by. How close to their schedule do they operate? What type of treatment do they afford this perishable commodity? What type of handling [644] do they give? Do they follow up with the papers? Do they notify the people that it is coming? All these factors. Their equipment. What classification, two-motored, four-motored? Where is it going? Is it going direct? All those factors are taken into con-

(Testimony of John C. Barulich.)

sideration when you are distributing the shipments.

That is how we get to the carrier.

Now, in the evening, let's say, I am working on St. Louis here. The carrier used to St. Louis could be TWA or Slick. We know during the course of the day with which carrier we have reserved space for this amount of boxes. Quite possibly we have reserved space for fifty boxes to St. Louis, and in the accumulation of the manifests we discover that we have got seventy. Then, we have to go through all of them and set them up quick to determine exactly the amount of boxes we have. Then we go to the carrier to determine how close we are going to be to our estimated request for space reservation. If we find we are running over on Slick by thirty-five boxes, we call them immediately to find out if they can handle it. If they say, "No, we are sorry; we have accepted other shipments; we have only reserved so much space for you," then we have to take one of those stations and try to get it out by some other carrier. In other words, it is not a set, tied-down rule. It cannot be.

And another thing that comes into the picture is Slick may call up and say, "We are going to be late with our St. Louis [645] flight."

And we say, "What time? What is late?"

We schedule the departure out of here, we will say, at six in the morning. If we can, we go over to TWA to get that same shipment out. In other words, it is very flexible as to just what is used in determining the routing policy.

(Testimony of John C. Barulich.)

Q. Suppose, for example, you tried to reserve space on a certain carrier and the carrier says, "We are not running a flight today," or "We are all booked solid; we have no space available for you today," and yet some shippers may have requested that you use that particular carrier; then what do you do?

A. We call the shipper, because we would have been advised of that in the morning when we requested space reservation. If the shipper is definite in demanding that his particular shipment go by a certain carrier who has advised us that it would not be acceptable, we tell him. The shipper would usually say to route it in a different manner. If he is hard-headed on the point and says it is going to go that way whether or no, we follow that instruction to the letter, deliver it to the carrier, and we are through.

Now, we are up to accumulating the air bills. We have so many boxes of a commodity in the description end of the air bill, and we have entered so many boxes of cut flowers that have been accumulated over these many manifests. The next procedure is to [646] take the actual weight as given for these flowers. You tabulate that. You tabulate it on a machine. Then it is listed. Then you take the dimensional weight for the same flowers. You list it also on an allocated space on the bill. Then you go through the bill again and take up the number of boxes of decorative greens, list the number of boxes.

(Testimony of John C. Barulich.)

You follow that procedure as in cut flowers, in determining the actual weight as against the dimensional weight. Then the evaluation of the complete consolidation is determined. Then the Bay Area advance is also determined, and put in the allocated space.

Now, from the evaluation, we determine how much has to be purchased to give us a certain amount of coverage for the shipment. Bay Area, being the shipper, the small component parts of the shipment aren't recognized as a shipment, actually; it is just part of a Bay Area consolidation.

Q. What do you mean by excess valuation?

A. Excess valuation is the carrier's terminology by which they assess a certain charge governing the declared value. Different carriers have a different rate of charge. For this case here, I would say that ten cents per $100 is the charge for excess value.

Now, for every $100 I declare on the air bill, the shipment that is being given to the carrier is paying, in reality, ten cents for each $100. That is prorated. We also tabulate on another basis, that the carrier gives you free valuation at [647] twenty cents a pound. We tabulate the tonnage that we are going to pay on, whether it is actual or dimensional; which ever produces a greater revenue for the carrier, that is the way it is extended. Then we accumulate the free valuation, plus what we are buying, and we put it in an allocated space on the air bill, under "Declared Value." That then becomes

(Testimony of John C. Barulich.)

the valuation of the complete shipment. No more; not a penny more than that. Under no circumstances can it be changed.

I failed to mention that in listing the flowers and decorative greens, there is a total drawn then of the two commodities, and a total box figure given to the carrier, and a total of the dimensional weight of both commodities.

Now, in rating purposes, the carrier assesses the charges to the dimensional weight or actual weight, whichever is the greater. In our case, the actual weight is greater than the dimensional weight, and the carrier is going to assess his rates on the actual weight, and right while we are working on this particular consolidation, we go through each and every manifest copy, and if it is going on actual weight there are two lines drawn through the dimensional weight so that the shipper will know that that particular shipment was rated as the actual weight.

If the same consolidation is rated at the dimensional weight, there are no markings of any description, so when the shipper receives his copy of the manifest back the next day and [648] he sees an actual dimensional weight with no lines drawn through it, he knows that shipment was rated at the dimensional weight. If a line is drawn through the dimensional weight, he knows it is actual.

This bill which covers the manifest attached to it, as in this case, St. Louis, is then extended for prorated charges. We charge on the basis of charts.

(Testimony of John C. Barulich.)

We have charts to each consolidation station, and the charts cover the rates and charges by the carrier, including transportation taxes, and it is on a graph scale. The 100-pound rate to St. Louis is a certain figure, and we have a chart for 100 pounds. It goes from one pound to 100, and it shows how much a shipment would be rated for air freight charges if it weighed fifty pounds, or if it was being rated for rating purposes from the manifest at fifty pounds. And if the rate the carrier was going to charge was the 100-pound rate, we then look at the 100-pound rate on the St. Louis charge, go to the fifty-pound entry, assess that charge there, which is inclusive of transportation taxes. That is the first entry against the shipment. That is the air freight rate.

Then an excess valuation is run in to cover that particular shipment. The next entry is the Bay Area advance. That is tabulated, and the figure is put in on the shipper's original manifest in the allocated space—"Adj. Charge"—adjustment charge or advance charge. That is the rating against that shipment.

This is the procedure followed right on through this [649] consolidation. If you come to cut flowers, then you have to assess the cut flower breakdown rate. Now, when these are all extended and rated, tabulated to determine the amount of charges that manifests accrue, the charge might be $200, our practice in the past was to go to the carrier with

(Testimony of John C. Barulich.)

the bill and the manifest and say, "Extend this bill now to see how close we are." Well, we found that that would take too much time up, because they had other duties to perform, so we, on our own, rate that bill out, not making any entries for our own purposes, to establish how close to $200 that carrier is going to charge our account. Because, you see, he pays the complete charge to the carrier.

If the carrier bill should tabulate to $250, and we only have $200 on the manifest, we start all over again, and determine where the error is. That happens quite frequently. So, we keep doing it until the charges on the manifest are close enough to the carrier's charge, or at least as much as the carrier's charge. If it should be five or ten cents over, we don't care. We let the agent on the other end just take care of that, on the kind of a basis he wants. But, we can never do it on such a basis that the agent on the other end is not going to be able to collect enough money off the manifest to cover the billing that the airline is going to collect from him.

The reason the charges cannot be actual—by that, I mean $200 on the manifest and $200 on the carrier's bill—is the [650] transportation tax. You get into twenty-five pounds and eighty pounds here, and 700 boxes, and possibly fifty or sixty cents, but it has to be within reason, so that the consolidation, then, if it proves out—we call this proofing, and, if it is within reason, this consolidation of all the papers attached to the carrier's air bill is delivered

(Testimony of John C. Barulich.)

to the carrier, who inserts in it a carrier air bill number. That air bill number is then taken off that master air bill and entered onto each and every one of the attached manifests. That becomes a permanent record of just how it moved, on what air bill number, and the date is on each one.

The carrier then extends his bill, and gets a charge. These manifests, and the air bills, are split up, then. They go in various directions. The carrier retains one here. The originating carrier retains a copy, and also a copy of the air bill. Bay Area gets two copies back. One copy is returned to the individual shipper, showing the charge. That is all the individual shipper gets, just a copy of his own manifest.

Now, I say, the carrier returns two to Bay Area. I mean two copies of the manifest, one copy of the air bill.

Q. Who keeps the air bill?

A. The Bay Area files have that air bill. And one copy of the manifest is attached to that air bill, which is going to become a permanent record of Bay Area.

The other copies of the manifests are distributed as follows: [651] Two are left. The agent on the other end gets a copy along with the air bill. He uses it as his instructions for forwarding, delivering, and for instructions to collect advance charges due that respective shipment.

The carrier uses the other copy as they see fit,

(Testimony of John C. Barulich.)

either to their general accounting office for accounting, or to the destination station. It all depends on the carrier. They have various ways of doing that. But, out of the five copies, that is where they go.

When the air bills, such as this one, this consolidated shipment, goes out the next morning, a man goes around and picks up from the various carriers all the bills covering movement in Bay Area's account the previous day. Those bills are brought back to the office and recorded. This recording has to do with the number of boxes carried by what carrier, to what break bulk station, and the amount of Bay Area's advances on it. This is a day sheet that is accumulated for every day's business.

At the end of a given time it is reaccumulated, and statements are made to the respective carriers to recoup the advance charges. In the case of straight shipments, those bills are also picked up, but there is only one copy of the air bill that is returned to Bay Area. Bay Area records that air bill in the day file, and returns it to the shipper, thereby having no record of that air bill other than the entry in the day file. [652]

That more or less covers the complete operation, with the exception that the same operation takes place at each break bulk station.

Q. Would you discuss or explain what happens at the break bulk point?

A. The break bulk point, we have arrangements with the carriers to notify our agent of the arrival

(Testimony of John C. Barulich.)

on a specific flight of our merchandise. He is usually performing a service comparable to Bay Area on this side. By that I mean that he is running a specialized service, and he will go out and meet that flight if he can do it. The carrier on the other side is keeping him advised of the estimated time of arrival of that particular consolidation, and he tells him how many boxes are on there from Bay Area for his account.

For instance, in the case of St. Louis, we will say Lukey Transfer used to have advance information that so many boxes were coming to him for distribution from Bay Area via a certain carrier. He would then keep track by the carrier as to when the shipments would arrive, and he will have dispatched trucks to accord an expedited service of delivery.

Now, when the airline finally makes delivery to this agent, they also deliver the copies of the manifest and the air bill. Any signatures for this consolidated shipment are recorded on only the air bill. The manifest copies are for the use of the agent in preparing beyond bills or preparing [653] a trucker's delivery statement, which he transfers certain information from the manifest over to his billing copy, showing the advance charges, adding it, and that becomes a bill to the ultimate consignee, if he is within the delivery area of the trucker.

If it covers a beyond shipment, then the trucker consignee follows the routing instructions as indi-

(Testimony of John C. Barulich.)

cated in the manifest. If it is air, he follows it by air. If it shows a requested air carrier, he supposedly does that. If it shows rail, he takes it to the rail terminal.

Q. Does he cut a new bill of lading via air or rail for transshipment?

A. Yes, he does. He becomes the shipper from there. He is the break bulk agent. He becomes the shipper in behalf of Bay Area, to forward that shipment.

Any C.O.D. collections noted on the manifest, he is responsible for the collection and remittance to the shipper.

Also, there are stipulations within the contract. The stipulations, or agreements, within the contract with this agent trucker indicate that in the event shipment is delayed and refused by the consignee, he is to contact the individual shipper by collect wire for disposition. If any C.O.D. is refused, he is to contact the original shipper for disposition. In other words, he works in with the individual shipper.

* * *

Cross-Examination

By Mr. Gaudio:

* * *

Q. There was no stipulated compensation either under the [671] Agency Contract or the Traffic Manager Contract?

(Testimony of John C. Barulich.)

A. The Traffic Manager Contract there was stipulated a price per box.

Q. And what was that price?

A. Ten cents per box; derived from boxes hauled, ten cents per box, and boxes delivered to the airfield, five cents per box.

Q. That was under Reynolds' operation?

A. That is right.

Q. But in so far as your formal status as agent receiving or accounting for funds belonging to Bay Area as principal, no account has ever been stated?

A. No.

Q. The correspondence which issued to Cereghino, which is copied into the record—by that I refer to the letter dated November 2, 1951, signed "Consolidated Flower Shipments, Inc., John C. Barulich, Executive Secretary"—of which this is a copy, and which has been received in evidence, was that original issued over the formal letterhead of Consolidated Flower Shipments, Inc.-Bay Area?

A. Yes, it was.

Q. The Articles of Incorporation and Bylaws of Bay Area, including its former name, did not have any stipulated membership dues, annual dues, or other form of assessment, did it?

A. Not to my knowledge. [672]

Q. Exhibit No. EA 363, to be offered in due time by the Enforcement Attorney, is a certified copy of the Articles of Incorporation. In the inception of the organization under Article X of the By-

(Testimony of John C. Barulich.)

laws, which will be considered as EA 363-A, as to membership, it reads as follows:

"Paragraph 2. Application for membership may be made to any officer or director of the Corporation. Election to membership shall be by the Board of Directors."

In your experience, since your association with Bay Area, have the members, in so far as new members are concerned, at any rate, been in pursuance of that provision of the Bylaws, to your knowledge?

A. Yes, they have, in every instance.

Q. Since your association in establishing annual dues and assessments for eligibility to membership, that provision has been followed?

A. Yes, it has.

Q. So that prior to the annual dues and assessments rule of Bay Area, any funds paid by any member or prospective member was on some other account; is that right? A. That is right.

Q. Either as purchaser of materials or capital, or outright capital contribution?

A. That is right.

Q. Since the organization and functioning of Airport [673] Drayage began, has Airport Drayage picked up or handled any shipments for either Piazza, as I believe he was referred to in the testimony, or Lee Brothers Nursery? A. No.

* * *

(Testimony of John C. Barulich.)

Q. You described in some detail, Mr. Barulich, the mechanics of the consolidation and break bulk services available to the members through Bay Area. Will you state in what particulars there has been any change in so far as the personnel performing that service since your initial operation as Airport Drayage?

A. Since the initial operation of Airport Drayage?

The major factor would be its office work and the creating of more personnel, naturally, brought about by all shipments going to an agent rather than on collect distribution, for one thing. The office work has tripled. The accounting features, listing the bills, prorations, and so forth.

Q. Has that in turn caused a demand for additional office and clerical work in the Bay Area facilities at the airport? A. Yes, it has.

Q. In making their segregations of boxes, either on the truck or at the terminal, is it necessary or advisable for personnel handling such equipment to have a detailed and personal knowledge of the special commodity offered by the particular member?

A. It takes thoroughly trained personnel.

Q. Can you tell us, or have you any way of approximating [680] at this time, how many different species of flowers or decorative greens are handled for Bay Area members?

A. I would be hazarding a guess—in the hundreds.

(Testimony of John C. Barulich.)

Q. And are there only two general classifications, cut flowers or decorative greens, or are there other bases for classification?

A. I know of no other classification covering the flower industry shipping, as far as classification is concerned.

Q. As respects the special type of flower of the particular member of Bay Area, does that have any relation to the particular air carrier, or its flight plan that might be utilized?

A. By all means, it does.

Q. Does the special commodity in question, flowers, decorative greens, have any greater or less effect upon the excess evaluation provision of normal tariffs, of common carrier air freight forwarders? A. Classification of the merchandise?

Q. Yes.

A. Yes. A box of roses, as an example, you might handle, it would possibly be worth as much as $150 to $200, whereas, a box of decorative greens might be worth as low as $7.00 or $8.00.

Q. Is that affected in any way by the terms "dimensional" or "actual" weight?

A. Not necessarily. [681]

* * *

Q. In that circumstance, the air bill which indicates the various prorations is put in reverse gear, as it were, and each individual member concerned pays the prorated transportation charge?

A. If made necessary by refusal, yes.

(Testimony of John C. Barulich.)

Mr. Gaudio: I think I have gone through the various points I would like clarified on direct through this form of cross-examination with Mr. Barulich.

Examiner Walsh: Mr. Wolf has cross-examination coming from back at the beginning when Mr. Barulich first started his testimony, so, do you wish to avail yourself of that privilege now, Mr. Wolf?

Mr. Wolf: I do, Mr. Examiner. It has all been covered so thoroughly, I am glad to say there are very few questions.

Q. (By Mr. Wolf): You have discussed with your various agents or truckers at various break bulk points throughout the United States, Mr. Barulich? A. Yes. [684]

Q. In how many cities in the United States do you have agents or truckers with whom you have entered into the agreement shown here as Exhibit No. 140? A. With how many?

Q. What cities?

A. Kansas City, St. Louis, Detroit, Chicago, Cleveland, Philadelphia, New York.

Q. Do some of those truckers handle shipments for Airborne and Freight Traffic, Inc., as well as for Bay Area? A. I believe they do.

Q. Are there some of them who previously handled the shipments only for Airborne?

A. To my knowledge, I don't know of such an arrangement.

Q. You don't know that presently Bay Area has a trucker or an agent in some city in the United States that used to represent Airborne solely?

(Testimony of John C. Barulich.)

A. I don't know that to be a fact.

Q. You don't know that? A. I do not.

Q. Can you give any explanation as to why a trucker was chosen by Bay Area who also handled shipments for Airborne?

Mr. Gaudio: Just a moment. I don't know that it makes any difference, Mr. Examiner, on the question of relevancy to this issue. I mean, one contractor carrier may work for any number of [685] people.

* * *

Q. Would you cover that at this time, Mr. Barulich? To assist you in that connection, assume that the loss or damage is fundamentally the liability of the direct carrier involved, or any connecting carrier by surface or otherwise, but that the loss or damage is sustained on a Bay Area shipment. As between Bay Area and any member of Bay Area on that single shipment, what, if any, responsibility attaches?

A. I might get the liability end of it out of the way. Bay Area has no responsibility or liability under its Articles and Bylaws to the members for the loss. However, trying to recoup the loss, the following procedure has been established whereby the individual shipper upon receiving notice that his shipment or part of a shipment has been lost or damaged, and upon receipt of a carrier's inspection report, builds up a claim file in his office, giving all supporting documents, copies of manifests,

(Testimony of John C. Barulich.)

any air bills he might have, copies of invoices, copies of salvage returns, and builds a picture for the Bay Area operation so far as claims are concerned. Then the claim is sent to Bay Area for processing with the carrier involved.

Bay Area, when it receives this claim, assigns a Bay Area number to it, and checks it completely for information on documents, produces any documents that are needed to follow the claim out and file it with the carrier, such as in the case of [707] a consolidation, a copy of the original air bill that covered the movement. That is attached, signed by the Executive Secretary in behalf of Bay Area, and filed with the carrier.

Any returns come back to Bay Area, because none of these claims are assigned, no interest is assigned, at this time. Any refunds or payments, whatever the case may be, are settled by Bay Area and disbursed on Bay Area's checks.

Q. To whom? A. To the complainant.

Q. A member of Bay Area involved?

A. That is correct, with provision for a deduction of the amount paid to cover the claims handling expense, which would be ten per cent. That is also banked through Bay Area and made payable by Bay Area.

Q. In other words, in that circumstance, Bay Area acts as agent in behalf of the particular member in processing the claim and remitting any payment, if liability is accepted by the carrier?

(Testimony of John C. Barulich.)

A. That is correct.

Q. If liability is denied by the carrier, is there any responsibility for payment of the loss by Bay Area to the member?

Mr. Wolf: Just a monment, Mr. Examiner. I object on the ground that it calls for the conclusion of the witness, particularly a legal conclusion. [708]

* * *

Q. Has this question of the adequacy or inadequacy of facilities, equipment and service made available by surface [710] carriers in destination territory resulted in changes in your contract agents from time to time? A. Yes.

Q. In each instance, has that been with the knowledge, consent, or approval of the Board of Directors?

A. At the direction of the Board, those changes have been made and authorized.

Q. Incidentally, earlier in the examination there was some discussion about your trips to the East. In fact, how many trips have you made to the East, Mr. Barulich?

A. I made one trip to the East as a representative of Consolidated Flower Shipments to attend a pre-hearing conference instituted by the Civil Aeronautics Board in Washington, D.C.

Q. In connection with that visit to Washington, D.C., did you have any instructions from the Board of Directors regarding calling upon your contract

(Testimony of John C. Barulich.)
agents or other representatives in destination territory?

A. I was instructed by the Board of Directors to continue from Washington, D.C., and visit the following stations: Pittsburgh, Pennsylvania, establish an agency there for distribution; Philadelphia, to change agencies; New York, to check on the operation; Cleveland, to check on the operation there; Detroit, to establish an agency; Chicago, to check on the operation; St. Louis, to check on the operation, possibility of [711] establishing another agency there; Kansas City, chick on the agency; and back to San Francisco. [712]

* * *

ALFRED G. ENOCH

was called as a witness for and on behalf of the Enforcement Attorney, and, having been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Stowell: [713]

Q. What is your name, please?
A. Alfred Enoch.
Q. And what is your business?
A. Wholesale florist.
Q. Are you a resident of San Mateo, Mr. Enoch?
A. No.
Q. What city do you reside in?
A. I live in the County of Santa Clara.

(Testimony of Alfred G. Enoch.)

Q. Did you, on the day of June 29, 1949, make the following announcement to the San Mateo Times? Incidentally. are you acquainted with the San Mateo Times?

A. Yes, I am acquainted with the paper, as a reader.

Q. "Fifteen Bay, San Francisco and Oakland flower shippers have formed a non-profit corporation to consolidate their air shipments and reduce costs; through eliminating many present charges and reducing transportation costs to ultimate consignees, the shippers hope to expand their markets."

A. No.

Q. Would you have any idea how you might have been quoted?

A. No. I really wouldn't.

Q. In other words, you claim that if any such announcement were made to the San Mateo Times on the date mentioned, it was completely without authorization? A. That is right.

Q. And that your name was selected without any knowledge [714] on your part?

A. That is right. [715]

* * *

Gentlemen, I believe I said before we adjourned last evening that I would leave the parties to the task of determining whether they could agree on a stipulation with respect to certain documents that Airborne would like to present for the record.

Are you prepared to state what the results of your efforts were?

Mr. Wolf: Yes, Mr. Examiner. Mr. Gaudio and Mr. Stowell have agreed to certain stipulations.

Reading now from the complaint of Airborne as filed, it has been agreed by the parties that the following facts may be stipulated:

Airborne Flower and Freight Traffic, Inc., is a corporation organized and existing under the laws of the State of California, having its prinicpal office and place of business at San Francisco International Airport, South San Francisco, California. Airborne is an air carrier operating as an air freight forwarder under a letter of registration issued to it by the Civil Aeronautics Board pursuant to the provisions of Part 296 of the Board's Economic Regulations. Ninety per cent of Airborne's business from the San Francisco Bay Area involves the shipment of flowers in air [722] transportation.

Respondent, Consolidated Flower Shipments, Inc.,-Bay Area, according to statements set forth in its application for an exemption in CAB Docket 5037, is a non-profit California corporation.

Complainant, over a period of several years has built up a substantial business as an airfreight forwarder, a great portion of such business consisting of indirect air transporation of flowers.

That is the end of the stipulation of facts.

Counsel have agreed that there may be admitted as exhibits on behalf of Airborne a mimeographed copy of a letter of registration No. 14, issued by the

Civil Aeronautics Board to Airborne Flower and Freight Traffic, Inc., as an airfreight forwarder, issued November 10, 1948, effective November 15, 1948, and reissued June 30, 1949. And I would request that that be admitted as Airborne's Exhibit No. 1. Copies have already been furnished to counsel.

Mr. Stowell: Mr. Examiner, before you make any ruling I would like to make one comment, please.

I am in agreement with the statement read by Mr. Wolf, subject to the following comment: The statement as read by Mr. Wolf was: "Respondent, Consolidated Flower Shipments, Inc.-Bay Area, according to statements set forth in its application for exemption, in CAB Docket 5037, is a California non-profit corporation." [723]

I would like to modify that slightly to read "is incorporated under California laws as a non-profit corporation." That is without reference of whether it may in fact be non-profit or not, in view of the issues in this case.

Is that agreeable to counsel for the respondents?

Mr. Gaudio: That is agreeable.

Mr. Wolf: That is agreeable.

Examiner Walsh: In other words, you are not making any concessions as to its status apart from the articles of incorporation?

Mr. Stowell: Yes, that is right.

Mr. Wolf: Counsel have also agreed to the introduction of a map of the United States entitled

"System Map, Airborne Flower and Freight Traffic, Inc.," and I ask that this be admitted as Airborne's Exhibit No. 2.

Examiner Walsh: The record will show that the parties have agreed to stipulate Airborne's Exhibits Nos. 1 and 2, the first consisting of the letter of registration from the Board, and Exhibit No. 2 being the Map or chart.

(The documents above referred to were marked for identification as Airborne's Exhibits Nos. 1 and 2, and were received in evidence.)

Mr. Wolf: The parties have agreed that there may be admitted as an Airborne exhibit a document entitled "Airborne Flower and Freight Traffic, Inc., Personnel Information, [724] February 15, 1952," which is submitted as Airborne's Exhibit No. 3.

As to the major issues involved in this matter, Airborne will rely upon the evidence adduced by the Enforcement Attorney.

Examiner Walsh: Does that complete your submission of exhibits?

Mr. Wolf: That completes our case, subject, of course, to any right of rebuttal in regard to new matters which may be brought up in defense.

Examiner Walsh: The record will show that the parties have also agreed to stipulate Airborne's Exhibit No. 3.

(The document above referred to was marked for identification as Airborne's Exhibit No. 3, and was received in evidence.)

Mr. Wolf: In addition, we offer as Airborne's Exhibit No. 4 a set of documents entitled "Freight Waybill and Invoice," consisting of a white top sheet, carbon paper, a yellow sheet, carbon paper, and an orange sheet, carbon paper, a pink sheet, a carbon paper, and a green sheet, carbon paper, green sheet, carbon paper, a white sheet, a carbon paper, and a yellow sheet—all attached together, offered as one exhibit.

Mr. Gaudio, do you stipulate to this?

Mr. Gaudio: So stipulated. [725]

Mr. Wolf: Mr. Stowell, do you stipulate to this?

Mr. Stowell: Yes.

Examiner Walsh: Let the record show that Airborne Waybill and Invoice just identified, the parties have agreed to stipulating, as Airborne's Exhibit No. 4.

(The document above referred to was marked for identification as Airborne's Exhibit No. 4, and was received in evidence.)

Mr. Wolf: We also offer as Exhibit No. 5 a document headed "Airborne Flower and Freight Traffic, Inc.", and designated as non-negotiable airbill request and shipping order, consisting of a white sheet, a yellow sheet and a blue sheet.

Is that agreeable to you, Mr. Gaudio?

Mr. Gaudio: So stipulated.

Mr. Wolf: Mr. Stowell?

Mr. Stowell: So stipulated.

Examiner Walsh: The foregoing document is stipulated as Airborne's Exhibit No. 5.

(The document above referred to was marked for identification as Airborne's Exhibit No. 5, and was received in evidence.)

Examiner Walsh: Does that conclude your case, Mr. Wolf:

Mr. Wolf: It does, Mr. Examiner. [726]

* * *

J. D. McPHERSON

was called as a witness for and on behalf of Bay Area, and having been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Gaudio:

Q. But it didn't reach formal incorporation?

A. No, sir.

Mr. Gaudio: So that we may follow my examination, at this point I wish to direct my further examination of Mr. McPherson on my case in chief.

Q. (By Mr. Gaudio): What was the purpose of the intended organization of California Consolidators?

A. Airborne had been in operation three years, and along came an organization, Bay Area, and took away a substantial part of our business. We had formerly been an association of shippers, and the Civil Aeronautics Board had had a hearing and we had to participate, and had been told to get a certificate, and had gotten one. Therefore, we thought the Civil Aeronautics Board would be able

(Testimony of J. D. McPherson.)

to tell us whether or not Bay Area could operate as they were, whether we should stay as we were, or whether we could go back to an association such as we had been.

I took a trip to Washington, and I called on seven members of the staff of the Civil Aeronautics Board in 1949, after the formation of Bay Area. We discussed the situation. [735]

At that time it was impossible to arrive at a satisfactory answer.

When I returned from Washington we took the bull by the horns and formed a consolidation arrangement of our own. We formed California Consolidators as a division of Airborne, and began performing consolidation service. We went to the Bay Area people, and asked them if they would join, and most of them did.

Q. When you say "most of them did," when did this request to the people of Bay Area to join California Consolidators take place, when was that made?

A. I wrote Mr. Zappettini, who was president of Bay Area, April 19, 1950.

Q. And is it your testimony that since April 19, 1950, most of the then members of Bay Area joined California Consolidators or this group?

A. The members did not join California Consolidators. The florists got together, as testified a few days past, at the California Floral Company, and discussed the formation of an association to join the two shipping groups together. And it was

(Testimony of J. D. McPherson.)

agreed that Northern California Flower Consolidators should be formed.

Mr. Oren B. Bowdish was elected the executive secretary. Mr. Zappettini was elected president, and most of the members of Bay Area became [736] members.

Q. Of this group called Northern California Consolidators?

A. That is correct. And Northern California Consolidators made a contract with California Consolidators, a division of Airborne, to handle all their consolidation of shipments.

Q. But did any of the Bay Area members join this California Consolidators?

A. No, sir. That was a division of Airborne.

Q. Will you state whether or not California Consolidators, or this group that you proposed to organize at that time was proposed to be limited exclusively to wholesale shippers, or the shippers which were wholesalers of flowers, as opposed to growers of flowers?

A. May I have that question again, please?

Examiner Walsh: Let the reporter read it.

(Question read.)

A. We had no opposition to anyone being members who wanted to ship flowers. The policy, however, was set down by the Board of Directors of Northern California Consolidators.

Q. (By Mr. Gaudio): Is it a fact that the only ones admitted to the service which was proposed to

(Testimony of J. D. McPherson.)

be offered through this guise was limited to wholesalers of flowers rather than growers?

Mr. Wolf: Of which organization are you talking about now?

Mr. Gaudio: The one that Mr. McPherson organized, or [737] initiated and organized. [738]

* * *

Cross-Examination

By Mr. Wolf: [767]

* * *

Q. Mr. McPherson, enlarging on the question of your automotive equipment, could you briefly describe what it consists of—that is, whether there is anything special in the nature of your equipment so far as flowers are concerned?

A. Yes. We discovered several years ago that doing the job on one end is not enough. It must be done on the other end correctly; so, we experimented with various types of trucks that would be suitable for delivering in the cold winter in the East, and also in the heat of summer. We made an arrangement with a body company in the State of Michigan to construct special trucks, especially equipped with 3-inch fiberglass insulation, solid rear doors, heaters, cooling systems, to specially protect flowers for delivery and transfer.

Q. And those are in use today? A. Yes.

Q. You were also asked by counsel on direct examination what the red lines meant on the map,

(Testimony of J. D. McPherson.)

which is your Exhibit No. 2, showing the points of destination and the various areas served by you. I submit to you at this time a document headed, "States and [768] Cities in which Airborne Flower and Freight Traffic, Inc., Gives Regular Service." There then appears on this exhibit a list of states in the lefthand column, the heading called, "Airport, City," and in the righthand column, "Areas Served by Airport City," and I ask you if that is correct? A. Yes, it is.

Mr. Wolf: I ask that this be admitted in evidence at this time as Exhibit No. 7.

Examiner Walsh: The foregoing document will be marked for identification as Airborne's Exhibit No. 7.

(The document above referred to was marked for identification as Airborne's Exhibit No. 7.)

Examiner Walsh: Is there any objection to the admission of these exhibits, Airborne's Nos. 6 and 7?

Mr. Gaudio: No objection.

Examiner Walsh: Hearing none, Airborne's Exhibits Nos. 6 and 7 are received in evidence.

(The documents marked as Airborne's Exhibits Nos. 6 and 7 were received in evidence.)

Q. (By Mr. Wolf): You were questioned on direct examination, Mr. McPherson, as to the number of growers, or various questions as to the growers of flowers who were members of the North-

(Testimony of J. D. McPherson.)

ern California Flower Consolidators, Inc. Can you identify from that list any members who were also members of Bay Area, and, if so, could you [769] read their names?

A. Wholesalers and shippers or growers and shippers?

Q. You can qualify each member whom you name as to that information.

A. Would you mean shippers and growers both with Airborne and Bay Area? Is that what you mean?

Q. Correct.

A. Stonehurst Nurseries, Wong Wholesale, Amlings of California, Boodel and Company, Bear State Nursery, Bay Road Nursery, Al Enoch, Davidson & Matraia Company, J. Nuckton Company, Mount Eden Nursery, Mountain View Greenhouse, Peninsula Wholesale, San Francisco Wholesale, Western Wholesale, Golden Gate Wholesale, William Zappettini Company, Kearns Wholesale, J. L. Mockkin, T. & D. Wholesale, L. Piazza.

Q. Those names you have just mentioned were members both of Northern California Consolidators and Bay Area; is that correct? A. Yes.

Mr. Gaudio: I didn't get the name following Nuckton.

The Witness: I have another list somewhere with some more on it.

Mr. Wolf: What is the name following Nuckton?

(Testimony of J. D. McPherson.)

The Witness: Mount Eden Nursery.

Mr. Wolf: Do you have some more names?

The Witness: I think I have. San Lorenzo Nursery and Jack [770] Adachi Nursery.

Mr. Wolf: That is all. Thank you, Mr. McPherson.

Mr. Gaudio: Mr. McPherson, were you reading from some document which was furnished you by Northern California Consolidators?

The Witness: No. This list was taken from Northern California Consolidators, as compared with the Bay Area list that I know of.

Mr. Gaudio: Do you know as of what date this list had been prepared by them?

The Witness: This is not taken from a list.

Mr. Gaudio: As of what date did you subscribe to the membership in both organizations?

The Witness: The question asked me, I believe, if they shipped both with Airborne and Bay Area at various times, and this means at any time.

Mr. Wolf: No, I will correct that. The answer is directed to the question as understood by the witness. My question specifically was, during the period of Northern California Flower Shipments, Inc., what members were members of Northern California Flower Consolidators and at the same time members of Bay Area?

The Witness: Well, I didn't understand——

Mr. Gaudio: I don't think I understood it that way. That was my question.

(Testimony of J. D. McPherson.)

Examiner Walsh: Let's have a correction on that. [771]

Mr. Wolf: Can you answer that question, Mr. McPherson? What I want to know now is what members are members both of Bay Area and of Northern California Flower Consolidators.

Mr. Gaudio: As of what date?

Mr. Wolf: If you can give the dates, not specific dates, but as of what periods of time, it would be helpful, Mr. McPherson.

The Witness: I have a list here. I am not sure of the dates, however. Amlings, Boodel & Company, Al Enoch, J. Nuckton, Mount Eden Nursery, Mountain View Greenhouse, Western Wholesale, Golden Gate Wholesale, William Zappettini, Kearns. That is fairly recent, but I am not sure of the date.

Mr. Wolf: Thank you, Mr. McPherson.

Mr. Gaudio: Do you have a list of that so I can check my notes accordingly? And those members you last named, according to your information, are both members of Bay Area——

Mr. Wolf: Do you understand the question?

The Witness: Yes.

Mr. Wolf: These names you have just read are members both of Northern California Consolidators and of Bay Area?

The Witness: Yes. I am still confused on this. I thought that what we wanted to find out was what members of Consolidated Flower Shipments were also shipping with us.

(Testimony of J. D. McPherson.)

Mr. Gaudio: That wasn't the question.

Mr. Wolf: No. My question was specific: What members of [772] Northern California Consolidators, Inc., are also members of Consolidated Flower Shipments, Inc.—Bay Area?

Mr. Gaudio: Well, that question, then, calls for his conclusion, Mr. Examiner.

Mr. Wolf: If he knows.

Mr. Gaudio: If he knows, he can only know through some official of Bay Area.

What I would like Mr. Wolf to do, if he chooses to do so, is to ask Mr. Barulich if he knows whether any of the members of Bay Area are also members of California Consolidators.

Examiner Walsh: I believe we had some testimony on that before.

Mr. Gaudio: The reason I am raising the point, Mr. Examiner, is that I have serious doubt that if the question were asked in detail that any of the names given are active members of Bay Area, and at the same time active members in any active organization known as Northern California Consolidators.

Mr. Wolf: Do you know that, Mr. McPherson?

The Witness: He is wrong, and this is the answer——

Mr. Wolf: Wait a minute, Mr. McPherson. Do you know the answer to the specific question I asked you?

The Witness: Yes, I do.

(Testimony of J. D. McPherson.)

Mr. Wolf: Very well.

The Witness: This letter was received September 19, 1950, from Mr. Oren B. Bowdish, Executive Secretary for Northern [773] California Flower Consolidators.

Mr. Gaudio: Just a moment now. That was the point of my examination. If you are testifying from what Mr. Bowdish told you, I will object, on the ground of hearsay.

The Witness: As Executive Secretary, he gave me a list of shippers that had been voted——

Mr. Wolf: Wait a minute.

Mr. Gaudio: Is there a ruling on it, Mr. Examiner?

Examiner Walsh: Let's see what the document is.

I believe I will have to sustain the objection. I don't think that this particular document indicates membership in any specific organization.

Mr. Wolf: Very well.

Mr. Gaudio: On that basis, may I ask that the witness' prior statement be stricken, Mr. Examiner.

Mr. Wolf: No. Can I correct that for the record? I am about to do that.

Mr. Gaudio: Let's get a clear record. I would like the previous testimony stricken; if it is in answer to a question to which objection has been sustained, it should be stricken. Then you can start from there.

Examiner Walsh: Let's strike the previous tes-

(Testimony of J. D. McPherson.)

timony, and, if you have any other information you would like to bring out, Mr. Wolf, you may do so.

Mr. Wolf: Very well. [774]

Q. (By Mr. Wolf): Mr. McPherson, in answer to the first question I asked you, which you misunderstood, you read me a list of names. Now, without having to repeat those names, this is the first list you gave me. What do you want to state about that list of names, as you understood it?

Mr. Gaudio: I will object to the question as irrelevant, incompetent and immaterial. It doesn't refer to anything.

Examiner Walsh: I will sustain the objection.

Q. (By Mr. Wolf): Mr. McPherson, have you knowledge of the names of shippers or growers, as the case may be, of flowers, who have shipped at any time through Bay Area and through Northern California Consolidators, Inc.? A. Yes.

Q. Is that the first list of names that you read?

A. No.

Q. Will you give me the names of those who have shipped through both organizations at any time?

A. William Zappettini Company, Golden Gate Wholesale, Davidson & Matraia, L. Piazza, John Nuckton Company, Wong Wholesale, Kearns Wholesale, Boodel & Company, Amlings of California. That is all I recall. [775]

* * *

Whereupon:

R. J. ADACHI

was called as a witness for and on behalf of Bay Area, and, having been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Gaudio:

Q. Mr. Adachi, what is your residence and occupation?

A. My residence is Mountain View, and occupation is grower of chrysanthemums.

Q. Grower of chrysanthemums?

A. That is right.

Q. How long have you been so engaged?

A. Ever since I can remember; the last ten years, I would say.

Q. Have you in the past found occasion to ship your products by air carrier to the East?

A. Yes.

Q. Are you a member of an organization which has been mentioned here this morning called Northern California Consolidators?

A. No, I am not.

Q. Have you ever been? A. No.

Q. Are you the Jack Adachi that was named in this proceeding? A. Yes, I am. [778]

Q. Did you ever apply for membership in the Northern California Consolidators?

Did you ever ask to be admitted as a member to that group? A. I am not sure.

(Testimony of R. J. Adachi.)

Q. Is yours a sole ownership business, or do you have any partner with you?

A. Right now, I am sole owner, but before I was in partnership with my brother.

Q. Your brother? A. Yes.

Q. What is his name? A. Elnao.

Q. Do you know, of your own knowledge, whether he was ever a member of Northern California Consolidators? A. No, he wasn't.

Q. When did you first commence to ship your products by Bay Area? A. 1947.

Q. By what means of transportation? By which agency did you ship by air at that time?

A. I wasn't a member of anything then, as far as shipping flowers. I just shipped flowers by air the best I can.

Q. And when you say the best you can, what was that in 1947? A. What was that again? [779]

Q. When you say the best way you could, what service did you use in 1947?

A. Slick Airways.

Q. You took your product directly to the airfield, did you?

A. Well, the thing was, in 1947, when I first started shipping, I wanted to ship it all by rail, but then those consignees wanted some boxes by air, so I heard of Airborne's Flower Traffic outfit, so I brought my flowers to San Francisco Airport and asked Mr. McPherson if he could handle those boxes for me, and I was definitely refused.

(Testimony of R. J. Adachi.)

Q. How many boxes did you have in that shipment? A. On that shipment, two boxes.

Q. Have you since that time endeavored to have your flowers transported by Airborne?

A. Yes, there were occasions.

Q. And were they transported by Airborne?

A. Well, I had trouble later on in 1948 again. That was in the first part of August.

Q. What was the difficulty at that time?

A. Mr. McPherson told me he couldn't handle a little guy like me, because he had to look after his big outfits, and he didn't want to lose any of their customers.

Q. Was that the last attempt you ever made to have your shipments transported by [780] Airborne?

A. I might have had some flowers shipped after that, but the dates I wouldn't know.

Q. How many boxes have your shipments averaged? A. By air freight? When?

Q. During the recent past, since you have been using Airborne or any other service.

A. That is pretty hard to say.

Q. Would there be two boxes on the average, five boxes on the average, ten boxes on the average?

A. You mean daily?

Q. Each shipment; what would it average?

A. I would say about an average of five to ten boxes five days a week, during the harvest season. Not all year around, but when I had the flowers.

(Testimony of R. J. Adachi.)

Q. How do you ship when you ship these flowers, on a consignment basis or a straight sale basis?

A. All my shipments are made 100 per cent consignment.

Q. That is an arrangement whereby you send the flowers to your consignee, he sells them, and retains a commission for himself; is that correct?

A. That is right.

Q. How were the transportation charges paid on that shipment?

A. Well, it is deducted from the gross sales.

Q. And charged to your account? [781]

A. That is right. In other words, I pay for all the freight that is paid.

Q. Have you found the use of air freight on a consignment basis, as you have described, an advantage in reaching eastern markets?

A. Yes.

Q. For that purpose, is the landed cost of transportation on your shipments a primary factor?

A. It is, very much.

Q. Have you ever made a study to see in your experience the relative cost of the transportation for shipment as compared to the value of the merchandise in that shipment?

A. What do you mean? Do you mean the percentage of——

Q. Yes.

A. Well, I would say about 20 per cent or 25 per cent. It depends on what you ship, depending on the flowers.

(Testimony of R. J. Adachi.)

Q. In other words, the cost of transportation in your experience averages about 25 per cent of the total cost to the consignee; is that what you mean, or represents 25 per cent of the value of the merchandise? A. Just about, yes.

Q. So that the landed cost of the merchandise in the eastern market has a definite ratio at which making a profit and making a loss would enter into the picture; is that right?

A. That is right, yes. [782]

Q. Are you a member of Consolidated Flower Shipments, Inc.—Bay Area? A. Yes.

Q. When did you first join? Can you approximate the date?

A. Let's see. I think it was November, 1949.

Q. Can you tell us at this time, Mr. Adachi, the cost of your transportation via Airborne prior to your membership in Bay Area as compared to the cost of your transportation via Bay Area?

Mr. Wolf: Just a minute. Mr. Examiner, it is no comparison at all. He is talking about a cost at two different dates. We haven't the slightest idea what the tariffs were at those times.

Examiner Walsh: It is possible to reconcile them by dates.

Mr. Gaudio: Very well.

Q. (By Mr. Gaudio): Can you give us an approximate date as to when you last used the Airborne service before your membership in Bay Area?

A. It must have been some time in 1949. The only thing I can say, they were high.

(Testimony of R. J. Adachi.)

Q. The rate was higher, is that what you mean, or the cost of transportation over all was high?

A. The cost of transportation per box was much higher than I anticipated. [783]

Q. Much higher than the cost per box by Bay Area? A. Yes.

Q. Can you give us any approximation of how much per box it is greater in your experience by Airborne as opposed to that of Bay Area?

Mr. Wolf: Just a minute. Mr. Examiner, I would like comparative dates given.

Mr. Gaudio: Still as of 1949, Mr. Adachi?

Mr. Wolf: What part of 1949? There are twelve months in 1949.

Mr. Gaudio: I believe the witness testified he joined Bay Area in November, so it would be prior to November.

Mr. Wolf: It might have been in January of 1949 that was the last shipment via Airborne, and he might have made his first shipment via Bay Area in November of 1949.

Examiner Walsh: I don't see how we have any basis for comparison.

Mr. Gaudio: Withdraw the question.

Examiner Walsh: I think about the most you could do is to get a general expression from the witness as to whether he found Airborne's charges higher or lower than Bay Area's.

Mr. Gaudio: He has already indicated that his experience showed that Airborne's charges were

(Testimony of R. J. Adachi.)

higher than the charges he has experienced with Bay Area.

Is that correct, Mr. Adachi? [784]

The Witness: That is right.

Q. (By Mr. Gaudio): When you say you are a member of Bay Area, I assume that your membership dues and assessments have been paid, and you are a member in good standing; is that correct?

A. Yes.

Q. Did you attend a meeting of the members of Consolidated Flower Shipments, Inc.—Bay Area on February 15, 1952? A. Yes, I did.

Q. And was that held at the San Francisco Municipal Airport, South San Francisco, California? A. Yes.

Q. I show you a document entitled, "Resolution of Members of Consolidated Flower Shipments, Inc.—Bay Area," and ask you, did you subscribe to that document as one of the members?

A. Yes.

Q. Where is your name?

A. Right here, this one.

Q. Being the sixth signature of the members to have subscribed? A. Yes.

Mr. Gaudio: We offer this as Respondent's next exhibit in order for identification.

Examiner Walsh: It will be marked for identification as [785] Bay Area's Exhibit No. 9.

(The document above referred to was marked for identification as Bay Area's Exhibit No. 9.)

(Testimony of R. J. Adachi.)

Mr. Wolf: At this time, Mr. Examiner, I would like to object to the introduction of this as completely self-serving, hearsay so far as this proceeding is concerned.

Q. (By Mr. Gaudio): Mr. Adachi, were you familiar with the contents of this resolution?

Do you understand the purpose of this hearing as an investigation regarding Bay Area's activities? A. Yes.

Q. Is it your purpose and intention as a member of Bay Area in the form of this resolution with the other members to subscribe your desire and intention that the activities of Bay Area be permitted to continue, or, in the alternative, its application for exemption granted?

A. Yes, I would sure like to see the Bay Area continue.

Mr. Gaudio: You may cross-examine.

Examiner Walsh: Cross-examination, Mr. Wolf.

Cross-Examination

By Mr. Wolf:

Q. Mr. Adachi, you have testified that generally you found that Airborne's shipments cost you more so far as freight, perhaps, is concerned, than Bay Area's shipments; is that correct? [786]

A. Yes.

Q. You understand, do you not, that Airborne is a regulated carrier under the jurisdiction of the Civil Aeronautics Board? You know that?

(Testimony of R. J. Adachi.)

A. So I understand.

Q. And you know that Bay Area is not, don't you?

Mr. Gaudio: Well, it is of record that Bay Area holds no operating authority as a carrier.

Q. (By Mr. Wolf): Do you know, Mr. Adachi, that if an air carrier, an indirect air carrier, is under regulation of the Civil Aeronautics Board that there are certain details, certain things that must be performed by it that do not have to be performed by a non-regulated group?

Do you understand my question?

A. No, I don't.

Examiner Walsh: Clarify it, Mr. Wolf.

Q. (By Mr. Wolf): Do you realize or know that if an indirect air carrier is regulated—that is, under the jurisdiction of the Civil Aeronautics Board—that it has to file reports and tariffs? You know that? A. Yes.

Q. Do you know that there are certain requirements in regard to service of a regulated [787] carrier? A. I guess so.

Q. Do you know anything about the Airborne service, the details of the service?

A. What do you mean?

Q. I will be more specific. Do you realize, for instance, that Airborne operates a teletype system through Dallas, St. Louis, Chicago, New York, Los Angeles, Boston and San Francisco? Do you know that?

(Testimony of R. J. Adachi.)

A. Well, I guess any big outfit should have those things.

Q. That is right. That costs money, doesn't it?

A. Oh, yes.

Q. Do you know, for instance, that the claims procedures are quite involved and cost considerable money?

A. It may be. I wouldn't know anything about claims.

Q. You wouldn't know about that?

A. No.

Q. You say that after you had this difficulty in 1948 with Mr. McPherson that you shipped by Airborne? A. I did, yes.

Q. When was the last time you shipped by Airborne?

A. Well, I can't say for sure, but it must have been some time in 1949.

Q. You didn't ship through Airborne in 1950? No shipments in 1950?

A. No, I don't think so.

Q. None in 1951? [788] A. No.

Q. None this year? A. No.

Q. You testified that on the first occasion in 1947, I believe it was, Mr. McPherson wouldn't accept a shipment of yours?

A. If I recall, I think he told me twice.

Q. I see. When was the first time?

A. The first time was some time in 1947, during the chrysanthemum season, and the second time it

(Testimony of R. J. Adachi.)

was either the end of July or the first part of August.

Examiner Walsh: Was that 1947 or 1948?

The Witness: The second time was definitely in 1948.

Q. (By Mr. Wolf): Do you know when Airborne received a certificate as a common carrier from the Civil Aeronautics Board?

Mr. Gaudio: Just a moment. I don't understand——

Mr. Stowell: Letter of registration.

Mr. Wolf: Letter of registration.

Q. (By Mr. Wolf): Do you know when that was? A. No.

Q. You don't know whether that was before or after you tendered a shipment to Mr. McPherson and he couldn't take it? You don't know that, do you? [789] A. Well——

Q. You don't know it, Mr. Adachi, do you? You don't know that?

A. Well—I think they have to have a certificate.

Q. As of what date did they have to have a certificate?

A. Before they go in business. You can't run a business like that without any kind of a license.

Q. Bay Area does, doesn't it, Mr. Adachi?

Examiner Walsh: We are getting into argument.

Mr. Wolf: I will withdraw the last remark.

Q. (By Mr. Wolf): Mr. Adachi, do you recall that on the first occasion when you offered a ship-

(Testimony of R. J. Adachi.)

ment to Mr. McPherson that on the same day you first went to Slick Airlines and they couldn't take the shipment?

A. No, I went to see Mr. McPherson first, and he refused me on the ground that the other large wholesalers wouldn't like it. So the only thing I could do was to go to Slick Airways and have my boxes shipped that way, and they went out that night.

Q. They did? A. Yes.

Q. Do you recall what time of day it was?

A. Oh, it must have been a little after noon.

Q. Wasn't it after three o'clock in the afternoon? Now, stop and think, Mr. Adachi. [790]

A. No, it can't be, because I usually have my boxes packed by twelve o'clock.

Q. Usually, not always?

A. 99 per cent of the time. I have to, because at night I am busy again. It have to pick flowers. So, I try to finish them up. In fact, almost all the time I am all finished by noon. The only thing I do is put them on a truck and take them out to the airport.

Q. This first time was July of 1947, around in there, to the best of your recollection?

A. Yes.

Q. The second time—When was the second time that Mr. McPherson said he wouldn't take the shipment from you?

A. I don't know whether it was the end of July or the first of August.

(Testimony of R. J. Adachi.)

Q. Do you recall who else was present when Mr. McPherson said that he wouldn't take the shipment?

A. I don't know. I was in his private office, if it was a private office.

Q. Was anybody else there?

A. A lot of girls working in the main office there.

Q. But in the private office where you were, was there anybody else there?

A. I don't recall.

Q. Don't you recall that Mr. McPherson said that there [791] wasn't any space available on that day? A. There could have been.

Q. Mr. Adachi, do you recall that Mr. McPherson told you there was no space available on the air line that day? A. He didn't say that.

Q. You don't remember that he said that?

A. No.

Q. Mr. Adachi, on the second occasion, do you remember whether or not you phoned in the morning to Airborne to reserve space?

A. I don't recall.

Q. What time do you usually bring the flowers into Airborne when you have shipped by them?

A. When I did ship by them, I usually took them up to the airport the early afternoons, but later on they came and picked them up.

Q. I see. Now, Mr. Adachi, try and think back to 1951 a little bit, will you please.

A. That is last year.

(Testimony of R. J. Adachi.)

Q. Just last year. Do you recall that you shipped—made approximately ten shipments by Airborne in 1951, now that you have thought about it? A. 1951? No.

Q. Last year.

A. Last season I did not ship any boxes by Airborne. [792]

Mr. Wolf: Thank you, Mr. Adachi. No further questions.

Examiner Walsh: Mr. Stowell?

Mr. Stowell: No.

Examiner Walsh: Redirect.

Redirect Examination

By Mr. Gaudio:

Q. Whatever conversation took place when you called at Mr. McPherson's office, you went directly to Slick and they took your shipment; is that correct? A. Yes.

Mr. Gaudio: That is all.

Examiner Walsh: No further questions of Mr. Adachi?

Mr. Wolf: No questions.

Examiner Walsh: Thank you. You are excused.

(Witness excused.)

Mr. Gaudio: At this time, I would like to call Mr. Yamane.

Whereupon:

KIO YAMANE

was called as a witness for and on behalf of Bay Area, and, having been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Gaudio:

Q. Mr. Yamane, what is your occupation and address?

A. My occupation is being a chrysanthemum grower and shipper. I live at 1948 Clark Avenue in Palo Alto, and also own land [793] in Mountain View.

Q. Have you had occasion to ship your flowers via air carriers to the eastern markets in the past?

A. Yes.

Q. On what basis do you ship, on consignment or straight sale? A. All consignment.

Q. You heard the testimony, did you not, of Mr. Adachi, regarding the consignment sale procedure with respect to the transportation costs?

A. Yes.

Q. Is that procedure the same as yours?

A. Yes. I will say that from the gross sales their commission is first taken off, and freight later taken off. In other words, we are paying for all freight.

Q. How long have you been shipping by air?

A. I will say the last six years, I believe. Since 1946, I think.

(Testimony of Kio Yamane.)

Q. Prior to the fall of 1949, did you ever use Airborne's service? A. Yes, I did.

Q. On how many occasions, generally, or were they periodically?

A. Whenever the occasion arose. As far as that goes, one of my first customers specified for air freight, so I used [794] Airborne's facilities from the beginning.

Q. How frequent were your shipments by air via Airborne before the fall of 1949?

A. How frequent? Oh, I will say about three times a week.

Q. And what was the average shipment? What would it consist of in boxes?

A. Probably, in those early days, maybe three or four boxes.

As far as that first question there, I tried not to ship by air unless they specified for it. In other words, if they asked for it by air, I shipped it by air, but otherwise I kept away from it.

Q. Otherwise, did you ship by rail?

A. Yes.

Q. Did you stay away from the air freight because of the extra cost of that form of transportation? A. Yes.

Q. Does the cost of transportation have a direct relation to how much business you do in the eastern markets? A. Yes.

Q. Were you ever a member of the organization known as the Northern California Consolidators?

(Testimony of Kio Yamane.)

A. No.

Q. Let me ask this question. You are a member of the Consolidated Flower Shipments, Inc.—Bay Area? [795] A. Yes.

Q. Prior to your membership in the Bay Area group, were any shipments of yours ever refused by Airborne? A. No.

Q. Do you recall the date about when you joined the Bay Area group?

A. I don't know when, exactly what day or year it was, but in the beginning.

Q. The very beginning? A. Yes.

Q. Do you remember the occasion when Mr. Reynolds, who was originally the contract trucker, disposed of his equipment to Airborne?

A. Yes.

Q. Did you ever have any conversations with Mr. McPherson about that fact, Reynold's transaction?

A. I believe he had phoned us up at our place. I wasn't in, but my wife said somebody phoned up from the Airborne.

Q. And did it have anything to do with truck transportation?

A. Well, they said that Reynolds sold out to Airborne and that there is no more Bay Area, that Airborne is the only company that is handling flowers.

Mr. Wolf: Mr. Examiner, I allowed a couple of questions and answers to go by there, because I

(Testimony of Kio Yamane.)

thought there might be a [796] foundation laid, but this seems to be hearsay. Somebody just phoned from Airborne. That is really insufficient foundation on which to base a telephone conversation.

Examiner Walsh: I will sustain the objection.

Mr. Wolf: I move that the last two questions and answers be stricken, then.

Examiner Walsh: I will grant the motion to strike.

Q. (By Mr. Gaudio): At this time, were you advised by any of your office personnel as to whether truck transportation by Mr. Reynolds was available or not?

Mr. Wolf: Mr. Examiner, I object to any statements by Mr. Yamane's office personnel in the absence of a person representing Airborne.

Mr. Gaudio: That is a yes or no question.

Examiner Walsh: Would you read the question back, Mr. Reporter?

(Question read.)

The Witness: Was I advised?

Mr. Gaudio: Just answer the question "Yes" or "No," whether anyone of your office personnel advised you regarding whether truck transportation by Reynolds was available.

Mr. Wolf: As far as Airborne is concerned——

Mr. Gaudio: If we are going to call a witness, we would like to lay a foundation. [797]

Examiner Walsh: I will allow the question. You may answer.

(Testimony of Kio Yamane.)

Q. (By Mr. Gaudio): Were you so advised? Just answer "Yes" or "No." Did you receive any advice to that effect? At your office?

A. I have no office. I am a one-horse outfit, so usually I get all the business matters brought to myself.

Q. I see. And when you are away from the office, who handles the telephone?

A. My wife does.

Q. And if you had any information regarding the transaction, was it from your wife?

A. Yes.

Q. Did you make any inquiry after that regarding the availability of truck transportation? Did you call anyone or make any investigation?

A. I don't know exactly what happened at that time. I don't know if I can remember if I let Airborne handle my flowers for a few shipments there. I can't remember.

Q. Who picked them up when Airborne handled them? A. They come and pick it up.

Q. An Airborne truck? A. Yes.

Q. Was Mr. Reynolds operating an Airborne truck? A. Was Reynolds operating? [798]

Q. Yes. A. No.

Q. Were any of Mr. Reynolds' former drivers operating an Airborne truck? A. Yes.

Q. How long did that continue?

A. I don't know.

Q. I mean, how long was it that Airborne handled your shipments for a time?

(Testimony of Kio Yamane.)

A. Since the termination; I will say maybe about a week.

Q. And after that was your service via Bay Area facilities resumed or continued?

A. Yes.

Q. Have you found any substantial difference in the cost of the transportation via Airborne according to your experience and the cost of your transportation via Bay Area?

A. Well, since the start, I understand there was a fifty cent charge. They were charging 75 cents for picking up on top of that, I understand.

Mr. Wolf: Just a minute, please.

Mr. Examiner, this is supposed to be of the witness' knowledge.

Q. (By Mr. Gaudio): Mr. Yamane, testify from your own knowledge and observation of the transportation charges paid by you for Airborne's [799] account. Go ahead.

Mr. Wolf: And the dates for comparison.

Examiner Walsh: And related to a particular time.

Mr. Gaudio: Yes.

The Witness: Until Bay Area came into formation, in my opinion—I mean, I have been told by Mr. McPherson and the secretary that they were charging one cent a pound on top of the cost for Airborne's expense.

Q. (By Mr. Gaudio): In other words, Mr. McPherson's secretary told you that?

(Testimony of Kio Yamane.)

A. I mean, I delivered the boxes there myself and inquired about rates and everything else.

Q. At Airborne's office? A. Yes.

Q. Who would you talk to?

A. I think I talked to Mr. McPherson there.

Q. And what did he tell you regarding the cost of your transportation?

A. Well, like I stated, 75 cents pick-up fee. Then there is that regular rate fee. There is one cent a pound charge for Airborne's expense.

Q. You mean that regardless of the weight of your shipment there would be a charge of one cent per pound? A. Yes. [800]

Mr. Wolf: Mr. Examiner, I go back to the original objection. The questions were as to whether Airborne's or Bay Area's charges are higher, and it is going to have to be specific as to certain points of time whereby there can be a true comparison. We are going into detail as to what this witness understands about costs and expenses. If he has any of his manifests, let him produce them. We can see exactly what is on them.

Examiner Walsh: You will have to relate it to a definite time.

Q. (By Mr. Gaudio): This was just before Bay Area; is that correct?

A. Yes, before Bay Area was formed.

Q. Very shortly before?

A. As far as I can remember, when I first started to join Bay Area, because I haven't shipped

(Testimony of Kio Yamane.)

anything, so far as I know, through Airborne after Bay Area was started.

Q. And what time was that with respect to the year or month that you were using Airborne? What calendar year and month were you using Airborne prior to Bay Area?

A. Well, I can't quite catch the question, but my shipping periods are between July and November.

Q. Did you ship between July and November of 1949? A. Yes.

Q. On the average of three times per week?

A. During that time, I believe, it was [801] more.

Q. And was it during this period that you had occasion to call at Airborne's office regarding the cost of your transportation?

A. Yes, I believe I did.

Q. And have you found, I believe you testified, a substantial difference between Airborne's cost and Bay Area's cost? A. Yes.

Q. And they are higher by Airborne than Bay Area? A. Higher.

Mr. Wolf: As of what date, I again ask?

Mr. Gaudio: I am speaking of the charges of Airborne's transportation before Bay Area, as compared with Bay Area's charges.

The Witness: Yes.

Mr. Gaudio: Is that correct?

The Witness: Yes.

Q. (By Mr. Gaudio): Now, can you give us on

(Testimony of Kio Yamane.)

a per box basis any approximation of that difference?

Mr. Wolf: Mr. Examiner, again I ask, if we are going into details as to the costs, let manifests be produced from each concern as of about the same period of time.

Mr. Gaudio: Mr. Examiner, let me ask this first.

Q. (By Mr. Gaudio): Mr. Yamane, has Airborne ever released or returned to [802] you any of the waybills on your shipments via Airborne?

Do you know what I mean by the waybill, the shipping document? A. Yes.

Q. Did you ever get those shipping documents, as to the boxes that went by Airborne?

A. That I can't say.

Q. Have you ever seen them come back from Airborne after the transportation was concluded?

A. I don't think so.

Q. Has Mr. McPherson ever given them to you?

A. I don't think so. I don't think I received any.

Q. When you say that Airborne's cost is greater than Bay Area's as of that time, from what source or information do you determine what Airborne's cost to you was at that time?

A. Well, from each consignment house we receive a statement listing down every deduction, and freight is definitely listed separately—commission, freight is listed down separately.

(Testimony of Kio Yamane.)

Q. That is the only way in which you ascertained Airborne's cost to you; is that correct?

A. Yes.

Mr. Gaudio: At this time, Mr. Examiner, I would like to have Mr. McPherson produce the original shipping documents, together with the assessments for transportation on the shipments [803] in behalf of Mr. Yamane for the calendar year 1949, and then we can make a comparison.

Examiner Walsh: Are they available, Mr. McPherson?

Mr. Wolf: What is that again? Do you want Mr. Yamane's manifests——

Mr. Gaudio: Showing thereon the total cost of the transportation to him.

Mr. Wolf: How many shipments do you want?

Mr. Gaudio: He said there were three or four times per week during a seasonal period. What was the season, Mr. Yamane?

The Witness: From approximately July to October and November, late in October and November.

Mr. Gaudio: From July through November, both inclusive, of 1949. That would be the completed documents which have been offered as Airborne's Exhibit No. 4 for the shipments in behalf of Mr. Yamane during that season in 1949, July to November, both inclusive. It is entitled, "Air Freight Waybill and Invoice," Airborne's No. 4.

Mr. McPherson: We can produce that. Do you want to know that, Mr. Examiner?

(Testimony of Kio Yamane.)

Mr. Wolf: Can you produce that?

Mr. McPherson: I can produce that. They are on file in the warehouse at Oakland, and it may be rather difficult, take a few days to get.

Mr. Gaudio: May we go off the record for this purpose? [804]

Examiner Walsh: Off the record.

(Discussion off the record.)

Examiner Walsh: On the record.

Let the record show that Mr. Wolf and Mr. Gaudio have agreed, first, that Mr. McPherson will secure the air bills with respect to Mr. Yamane's shipments by Airborne, and then Mr. Wolf and Mr. Gaudio will sit down and make a comparative statement showing charges assessed by Airborne on the one hand, and charges assessed by Bay Area on the other, during a representative period, and that the comparison should be a contemporaneous one; and that such statement shall be forwarded to me in Washington, and the parties have agreed that it should be submitted in evidence. If there are any differences of opinion with respect to the comparison, those differences should be set forth in attachments to the comparative statement, and we will receive that as Bay Area's Exhibit No. 9.

Will that be satisfactory?

Mr. Gaudio: Yes. Make a note of that for the record.

(Testimony of Kio Yamane.)

(Bay Area's Exhibit No. 9 was reserved for identification of the document above referred to.)

Mr. Gaudio: I might say in that connection that if any differences should arise regarding landed cost and ultimate cost, Mr. Wolf and I, with Mr. McPherson, should be able to work that out.

Mr. Wolf: For what period, Mr. Gaudio, do you want this? [805]

Mr. Gaudio: You mean for his waybills?

Mr. Wolf: It is difficult to pull them out of the files.

Examiner Walsh: It should be for a period immediately prior to and immediately after he joined Bay Area. I would suggest that the period be narrowed, because I can see where as time is drawn out it might not be truly representative, because tariffs might be different during the period. But, I am wondering if you couldn't determine on a period such as about two or three weeks.

Mr. Gaudio: I would say this, that Mr. Yamane—Inasmuch as we are on the record at this time—Your freight shipments are seasonal, is that correct?

The Witness: Yes.

Q. (By Mr. Gaudio): You go between July and November of each year; is that correct?

A. It is earlier than July.

Q. How soon?

A. During the last few years, June.

(Testimony of Kio Yamane.)

Q. June to November; is that correct?

A. Yes.

Q. And in November of 1949 you started using Bay Area?

A. I believe so, if it is when it started.

Mr. Gaudio: For that reason, Mr. Examiner, we would like to show the cost of the transportation in 1950 for the 1950 season, [806] June to November, as compared to the prior year.

I would be willing to stipulate that the same rate might be made applicable as was applied in 1949, as far as that goes. I don't want to raise the issue of rates.

Examiner Walsh: Didn't we get testimony here that he used Airborne's service after he joined Bay Area?

Mr. Gaudio: That is true, but the point is that he used Airborne for the season of 1949, and he used Bay Area for the 1950 season. The only way we can make a comparison in Mr. Yamane's case is to show the two seasons.

Examiner Walsh: When did he join Bay Area?

Mr. Gaudio: Do you remember when you first joined Bay Area, Mr. Yamane?

The Witness: Like I said, I don't know the exact month or year, but it was in the beginning, when it started.

Examiner Walsh: That would be some time in 1949, wouldn't it?

The Witness: 1949.

(Testimony of Kio Yamane.)

Examiner Walsh: And that would be during your flower season?

The Witness: Yes.

Examiner Walsh: And during the period immediately after you joined Bay Area, did you ship flowers east through Bay Area's service?

The Witness: Yes, for a little while. [807]

Mr. Gaudio: Until the season closed?

The Witness: Yes.

Examiner Walsh: All right. I want the comparative statement related to that period, because otherwise you would have too much of a disparity.

Mr. Gaudio: Did you use Airborne in the 1950 season?

The Witness: As far as I know, I haven't used their facilities.

Examiner Walsh: A 1950 comparison would carry us too far afield, Mr. Gaudio.

Mr. Gaudio: I was trying to get a comparison on a seasonal basis.

The Witness: I will say, except for the trouble at the time, I might have used Airborne's facilities then.

Mr. Gaudio: You mean during the trouble with Mr. Reynolds you might have used Airborne?

The Witness: Yes.

Mr. Gaudio: Could we use that period as a comparative period?

Mr. Wolf: Mr. Examiner, the purpose of this comparison, as I understand it, is to show why Bay Area was organized——

(Testimony of Kio Yamane.)

Mr. Gaudio: It continues to exist, if the Examiner please.

Examiner Walsh: I am going to hold the comparison to a representative period in 1949. If the parties can agree upon that, it will be satisfactory. Otherwise, I will require that [808] the evidence be produced in the regular fashion at this hearing.

Q. (By Mr. Gaudio): Mr. Yamane, did you attend a meeting of the members of Consolidated Flower Shipments, Inc.—Bay Area, held on February 15, 1952? A. Yes.

Q. I show you a copy of a resolution, and ask you if you subscribed the same, together with the other members shown thereon? A. Yes.

Examiner Walsh: Is this the document you presented to me? There is no purpose in referring to that any further in this hearing, because, if you offer the testimony, I am going to refuse to receive it. It should be filed in the case involving your exemption application.

Mr. Gaudio: I thought we had incorporated the exemption as a part of this record, Mr. Stowell.

Mr. Stowell: I will agree to——

Examiner Walsh: Merely for the purpose that the exemption application has been made, but this particular document is an appeal to the Civil Aeronautics Board, a petition to grant the exemption for certain purposes. Now, your exemption is not an issue in this particular case.

Mr. Gaudio: I appreciate that, but my thought

(Testimony of Kio Yamane.)

was that inasmuch as the application for exemption has been alluded to here many times that the position of the members in that respect would [809] certainly be material to the Board's consideration on all of the issues involving Bay Area.

Examiner Walsh: As I recall, the only reason that the exemption application was alluded to was for the purpose of showing that Bay Area had requested an exemption from the Board to relieve it from what Bay Area would otherwise probably characterize as rather a difficult tariff situation.

Mr. Gaudio: That is part of it.

Examiner Walsh: And I don't believe the application was alluded to for any other purpose.

Mr. Stowell: I agree, Mr. Examiner. I agreed to stipulate the fact that an application for exemption has been filed, but did not stipulate the contents whatsoever. However, I offer no particular objection.

Examiner Walsh: I have to draw the line somewhere.

Mr. Stowell: Its materiality, of course, is very low.

Examiner Walsh: It certainly is not material to any issue in this case. It should be filed in connection with your exemption application. I will not use it, whether it is in the record or not.

Mr. Gaudio: I would like to make one further observation, Mr. Stowell. It is true, is it not, that

(Testimony of Kio Yamane.)

the application was filed pursuant to various conferences which you and I had?

Mr. Stowell: That is correct.

Mr. Gaudio: And that the form of the application addressed [810] to the Board is for an exemption, if such an exemption is deemed necessary?

Mr. Stowell: That is correct.

Mr. Gaudio: And whether it is deemed necessary may depend on the determination of this investigation; is that correct?

Mr. Stowell: I think that the Examiner should not draw any inference of an admission from the filing of the exemption. I believe that is the purpose of your remarks, and I will agree to that.

Examiner Walsh: Of course, you understand, I am not planning on treating the question of this exemption application in my report at all. That is something that is entirely different and an independent matter; regardless of the fact that even a cease and desist order might be issued in this case, that would be no bar to the Board's granting this Respondent an exemption, or, in fact, be no bar to the Board's granting a letter of registration, if the Board saw fit to do so. I am not speaking for the Board, you understand.

Mr. Stowell: Mr. Examiner, technically, the filing of an application for an exemption is irrelevant to this proceeding. However, I felt that no great harm would be done if we stipulated the fact that an exemption had been filed. I mean, the

(Testimony of Kio Yamane.)

Board is perfectly cognizant of what is relevant and what is not.

Mr. Gaudio: I understood it was part of this record, because Mr. Stowell was examining Mr. Barulich at some length on [811] this matter.

Mr. Stowell: That was for purpose of cross-examination. I exhibited the portion I was interested in, but I am quite sure I stated at the time that I was not stipulating the contents.

Mr. Gaudio: If I understand the Examiner correctly, in so far as the record of this proceeding is concerned, his only thought in that connection will be that an application for exemption, if necessary, has been filed. Is that correct?

Examiner Walsh: No inferences will be drawn from the fact that it has been filed. That will be handled independent of this proceeding, and I can see actually that it is not dependent in any respect on the outcome of this proceeding.

Mr. Stowell: I agree, Mr. Examiner, that your remarks are quite accurate, and the only reason that I even agreed to stipulate the fact of the exemption being filed was merely out of deference to the Respondents, realizing it was probably irrelevant to this proceeding, but I had no great objection to it.

Mr. Gaudio: I have no further questions of Mr. Yamane.

Mr. Wolf: I have a couple of questions. It will just take a minute, Mr. Examiner.

(Testimony of Kio Yamane.)

Examiner Walsh: Cross-examination of Mr. Yamane by Mr. Wolf.

Cross-Examination

By Mr. Wolf:

Q. Mr. Yamane, you testified that you saw some truck [812] driver on an Airborne truck who previously had driven a truck for Mr. Reynolds. Do you remember his name?

A. I do not, but this fellow formerly, quite some time before, worked for the Railway Express Company, and transferred over. Meanwhile, I don't know what he was doing, but then he was working for Reynolds. I don't know what his name was—a young fellow.

Q. And you think that was around 1950?

A. Yes, that is right.

Q. As a matter of fact, when a flower shipment is picked up at your place of business, the truck driver leaves you a document that looks something like this Exhibit No. 5 of Airborne, doesn't he? He gives you a receipt for the shipment?

A. Yes.

Q. He does give you a receipt for the shipment?

A. It is blank; just what I fill out.

Q. What you fill out is on the sheet, and it is receipted for? A. Yes.

Q. You testified that you heard or knew about

(Testimony of Kio Yamane.)

Airborne having bought out Mr. Reynolds. Is that what you said? Something like that?

A. Yes, I was told that Airborne bought out his equipment. And also, I believe—I don't know if it was Reynolds or——

Q. That is all right. You knew about the equipment. Do [813] you know, as a matter of fact, Mr. Yamane, that actually Airborne bought one truck from Mr. Reynolds? A. Yes.

Q. Do you know that, one truck, that is all?

A. Yes.

Mr. Wolf: No further questions.

Examiner Walsh: Mr. Stowell?

Mr. Stowell: I want to ask one question.

Q. (By Mr. Stowell): What happens at the other end? Let's say you send two boxes of flowers to a consignee in Washington. What happens as soon as he gets the boxes, do you know?

A. No, I don't know. Some houses, it seems like they pay the freight bill right away, and some are on credit. I ran into cases like last year they didn't deduct for freight.

Q. They did not deduct for freight?

A. No, I had to pay at the end of the year.

Q. You had to pay at the end of the year?

A. I had to make out my own check and send it back East.

Q. Let's take the case where the consignee does pay the freight as soon as he gets the boxes. Suppose he can't sell those two boxes, and he gives you a report at the end of the week that he just can't

(Testimony of Kio Yamane.)

sell them, the flowers wilted away or they died. Then what happens as far as the freight is concerned?

A. I still have to pay for it. [814]

Q. You mean, he bills you for that freight?

A. Yes.

Q. He sends you a report which says——

A. Dumped.

Q. Dumped; haven't taken in a single nickel for those boxes. Do you send him a check covering the freight?

A. No, I don't send him a check, but I make other shipments. That has to cover that freight.

Q. Let's suppose that he doesn't want flowers from you any more.

A. I had that incident last year, where I had to send them my own check to cover that freight cost.

Mr. Stowell: No further questions.

Examiner Walsh: Mr. Gaudio, do you have any redirect?

Redirect Examination

By Mr. Gaudio:

Q. Mr. Yamane, you have attended various meetings of the members of the Board of Directors of Bay Area, have you? A. Yes.

Q. And are you familiar with the provision in the By-laws of Consolidated Flower Shipments, Inc.—Bay Area that its affairs and policy are gov-

(Testimony of Kio Yamane.)

erned by the members of the Board of Directors?

A. Yes.

Q. And, as a member in good standing, you accept the [815] directions as determined by the members according to majority rule; is that correct?

A. Yes.

Q. Do you know of any circumstance or matter of policy affecting Bay Area that was not without your approval and knowledge at all times?

A. What was that again?

Q. Has Bay Area ever performed any act, so far as you know, in handling shipments in its service they rendered for you in any manner that wasn't with your full knowledge and consent at all times?

A. No.

Mr. Gaudio: No further questions.

Mr. Wolf: No questions.

Mr. Stowell: I just have one little question.

Recross-Examination

By Mr. Stowell:

Q. At the other end, again, suppose the two boxes were sold and the florist gets $20, and the air freight charges are $2.00. What commission does the florist take?

A. Twenty or twenty-five per cent, depending on the city.

Q. Of what amount, $18.00?

A. You said $20.00.

Q. I said they sold them for $20.00, but that the

(Testimony of Kio Yamane.)

air freight charge was $2.00, so that he ended up really with $18.00. [816]

Does he figure his 20 or 25 per cent on $18.00 or the $20.00? A. $20.00.

Mr. Stowell: Thank you.

Mr. Gaudio: Thank you, Mr. Yamane. [817]

* * *

JOHN C. BARULICH

resumed the stand and testified further as follows:

Cross-Examination
(Continued)

By Mr. Wolf: [989]

* * *

Q. Mr. Barulich, what air lines are presently used by Bay Area?

A. Every air line that operates out of San Francisco that is certificated.

Q. What connecting carriers are frequently used?

Mr. Gaudio: By whom?

Mr. Stowell: By Bay Area in connection with its routings.

The Witness: I believe that in some phase of the operation, or at some time since Bay Area has been established, every certificated air line within the United States has been employed.

Q. Is it true that the Slick Airlines is used for shipments routed to St. Louis more than any other carrier?

(Testimony of John C. Barulich.)

Mr. Gaudio: Are we indulging in any particular——

Mr. Stowell: These are all preliminary questions.

The Witness: The factors there for governing routing are, if their service happens to be better or superior to that of a competitor, or an alternate air line, they are given the movement.

Q. Who determines whether their service is superior?

A. Periodic checks by the Board of Directors of Bay Area. On inquiries to me over past history performances, it developed that an air line should be considered to handle that particular [1002] tonnage.

Q. Mr. Barulich, have any routing instructions been issued by the Board of Directors subsequent to Exhibit BA-16?

A. They are issued practically every Board meeting, but on a verbal basis, nothing ever printed or mimeographed.

Q. There is nothing on record to indicate that "Necessary instructions will be changed from time to time, according to arrival time service, new air lines, and so forth, subsequent to the 12th of July, 1949"?

A. I believe the minutes will bear me out on that. There must be changes. Have you examined the complete minutes?

Q. Mr. Barulich, you have submitted this, the purport of which is that new instructions are to

(Testimony of John C. Barulich.)

be issued from time to time, and I ask you if in fact any new instructions have been issued in the same manner as this one was?

A. I say I have never received anything on a typewritten or mimeographed form, although I have received verbal instructions. That was prior to my becoming Executive Secretary, and part of the role of Executive Secretary was verbal instructions as to routing.

Q. Have you received any such instructions since the 23rd of June, 1950?

A. Routing is a constant headache with the members of Bay Area, particularly the Board of Directors, and changes are being made daily. Requests from customers come in, routing [1003] requests, carrier requests. [1004]

* * *

J. D. McPHERSON

resumed the stand and testified further as follows:

Direct Examination
(Continued)

By Mr. Stowell:

Q. Mr. McPherson, would you tell us which of the members of Bay Area now ship via Airborne?

A. Amling Company, Boodel Company, Golden Gate Wholesale, Western Wholesale, Kearns, San Lorenzo, Nuckton, Mount Eden, [1086] Mountain View Greenhouses, William Zappettini, Enoch, R. J. Adachi.

(Testimony of J. D. McPherson.)

Examiner Walsh: That question is with respect to Airborne?

Mr. Stowell: Yes.

Q. (By Mr. Stowell): Mr. McPherson, did you hear the testimony of Mrs. Decia? A. Yes.

Q. Do you recall that she testified about a Mr. Van Duker? A. Yes.

Q. Are you acquainted with that individual?

A. Yes.

Q. Could you tell us who Mr. Van Duker is?

A. Mr. Van Duker is a traffic consultant and specialist in the produce market, who was asked to make a talk at the Claremont Hotel before a group of florists, close to a year ago, I believe it was. He stated that the florists industry could have a much better arrangement that it does have at present, if they would all get together and form one big group which could process their own claims and get better rates and all the other advantages that one group could have.

So a series of meetings, I think about six, were held in the last half of 1951, of all the florists of that area, all invited, and most of them attended, discussing the formulation [1087] of this new group to supersede both the Bay Area group and Northern California Flower Consolidators, and any other associations.

It was proposed that this group would spend in excess of $20,000 the first year, therefore each member was to be assessed on the basis of his volume of shipping. Some of the florists insisted that all

(Testimony of J. D. McPherson.)

members would have to put up the money in advance, and this naturally amounted to a considerable sum for some wholesalers, and they did not desire to put that much money up in advance, and after one or two meetings in which they could not agree on the amount of money or when to put it up, or how to put it up, it was my understanding that the organization just sort of fell apart, or the desires of the organization were never carried out.

Q. To your knowledge, does this proposed group have any connection with the Northern California Flower Consolidators, Inc.?

A. Not directly. It was to include all florists. In fact, both John Barulich and myself would probably have lost identity entirely, had no connection with it.

Q. To your knowledge, do you know if any of the members of Bay Area attended any of the meetings in that connection?

A. Yes, they did.

Q. Do you have any knowledge of whether any of the members of Bay Area participated in any way in any of the organizational [1088] embryonic steps?

Mr. Gaudio: Just a moment.

Mr. Examiner, the witness has already testified it had a series of pre-organization meetings, but never formulated any specific plans, and the organization died.

Now, I think the testimony ought to die at that point, too.

Mr. Stowell: I will withdraw the question.

(Testimony of J. D. McPherson.)

No further questions.

Mr. Wolf: No questions.

Examiner Walsh: Mr. Gaudio?

Cross-Examination

By Mr. Gaudio:

Q. Mr. McPherson, when you mentioned various names of Bay Area members who presently ship via Airborne, are they straight shipments or consolidations, or is there any allocation?

A. It could be either.

Q. And that is a transaction, I assume, in which the particular florist shipper tenders flowers in boxes to you for transportation; is that right?

A. Yes.

Q. And you pick it up? A. Yes.

Q. In some of those transactions is it true that Bay Area does not enter into the picture as such?

A. You seem to have a double negative there that I do not [1089] quite understand. [1090]

* * *

Mr. Stowell: Mr. Examiner, at this time I would like to read a stipulation that the Enforcement Attorney is entering into with Respondents.

Mr. Wolf: Just a minute.

Mr. Examiner, there is another party in this case. I [1105] would like to see the stipulation, or hear it, before you start talking about a stipulation that is going into this record.

Examiner Walsh: Have you reduced it to writing?

Mr. Gaudio: It is in scratch form.

Examiner Walsh: Will you show it to Mr. Wolf before you read it into the record?

Off the record.

(Discussion off the record.)

Examiner Walsh: On the record.

Mr. Stowell: Mr. Examiner, during the California peak seasons of field flowers, high air transportation rates lead to a higher required competitive offering selling price in the eastern markets, which in turn leads to reduced sales and reduced commissions to the wholesale outlet, and may even lead to the elimination of the source of supply to that particular wholesale outlet by the California grower or shipper.

Mr. Gaudio: So stipulated.

Mr. Wolf: So stipulated.

Mr. Stowell: It is our understanding that this is an agreed statement of fact.

Mr. Gaudio: Can we identify it in connection with a particular receiver or location?

In other words, if so-and-so were called to testify, who would that be?

Mr. Stowell: If anyone were called to testify, it would be [1106] a wholesale commission merchant in an eastern market.

* * *

Received March 18, 1952. [1107]

United States of America Civil Aeronautics Board
Washington, D. C.

Docket No. 4902, et al.

In the matter of

CONSOLIDATED FLOWER SHIPMENTS, INC.-BAY AREA, et al.

Adopted by the Civil Aeronautics Board at its office in Washington, D. C., on the 5th day of February, 1953.

Order No. E-7139

ORDER

A full public hearing having been held in the above-entitled proceeding and the Board, upon consideration of the record, having issued its opinion containing its findings, conclusions and decision, which is attached hereto and made a part hereof;

Upon the basis of such opinion and the entire record herein, and under the authority contained in sections 205(a) and 1002(c) of the Civil Aeronautics Act of 1938, as amended;

It is Ordered that:

1. Consolidated Flower Shipments, Inc.-Bay Area, its successors and assigns, and John C. Barulich, its executive-secretary, and its officers, directors, agents and representatives cease and desist from engaging indirectly in air transportation in violation of section 401(a) of the Act;

2. This proceeding, insofar as it relates to Wil-

liam Zappettini, other than in his capacity as officer and director of Consolidated Flower Shipments, Inc.-Bay Area, be and it hereby is dismissed.

3. This order shall become effective 12:01 a.m., on March 7, 1953.

By the Civil Aeronautics Board:

[Seal] /s/ FRED A. TOOMBS,
Acting Secretary.

United States of America, Civil Aeronautics Board, Washington, D. C.

Docket No. 5037-4902

In the matter of

The Application of CONSOLIDATED FLOWER SHIPMENTS, INC.-BAY AREA, WILLIAM ZAPPETTINI, an Individual; JOHN C. BARULICH, an Individual, for an Exemption Under Section 1(2) or Section 416(b) of the Civil Aeronautics Act of 1938, as Amended, if Applicable.

Adopted by the Civil Aeronautics Board at its office in Washington, D. C., on the 5th day of February, 1953.

Order No. E-7140

ORDER

It Appearing to the Board that:

1. The Board by Order Serial No. E-5264, dated April 9, 1951, instituted an investigation (Docket

No. 4092) into the operations of Consolidated Flower Shipments, Inc.-Bay Area (Bay Area), to determine whether Bay Area has engaged or is engaging indirectly in air transportation in violation of the provisions of the Act, particularly section 401(a) thereof, or any requirement established pursuant thereto, particularly Part 296 of the Board's Economic Regulations;

2. Bay Area, William Zappettini, and John C. Barulich filed an application herein on July 30, 1951, for an exemption pursuant to section 1(2) or 416(b) from the provisions of Title IV of the Civil Aeronautics Act and the Economic Regulations issued thereunder, if applicable;

3. In support of their application, applicants allege: (1) Bay Area serves only its members and not the general public; (2) it is non-profit and cooperative in nature; (3) it ships merchandise which is produced and transported under unusual circumstances; (4) Bay Area's services are not available at economical charges from registered forwarders; (5) elimination of Bay Area would result in the imposition of prohibitive freight charges upon the products shipped by members, with a consequent loss of their eastern markets. Memoranda in opposition filed by Airborne Flower and Freight Traffic, Inc. (Airborne), a registered air freight forwarder, allege: (1) many of Airborne's former customers have become members of Bay Area; (2) Airborne and Bay Area are in direct competition; the grant of the application will threaten the existence of registered forwarders; (3) Bay Area and

other non-profit associations have been created by the certificated direct carriers as a means of making it impossible for air freight forwarders to continue operating.

4. Order Serial No. E-6410, adopted May 8, 1952, ordered that consideration of said exemption application be deferred until conclusion of the investigative proceeding in Docket No. 4902;

5. On July 21, 1952, the applicants filed a motion for consolidation of Docket No. 5037 with Docket No. 4902; on July 25, 1952, Airborne filed a memorandum in opposition to said motion; on July 28, 1952, the Enforcement Attorney in Docket No. 4902 filed objections to said motion;

6. The Board is simultaneously herewith issuing its opinion, decision and order in Docket No. 4902 (concluding the investigative proceeding therein), the record in which we have considered in making our findings herein;

In view of the foregoing matters, and acting pursuant to sections 1(2) and 205(a) of the Civil Aeronautics Act of 1938, as amended, the Board finds that:

1. Regulation of air freight forwarders was established after a full and complete investigation and hearing in the Air Freight Forwarder Case, 9 CAB 473 (1948);

2. The application raises questions of such a complex and controversial nature that they should be thoroughly explored in a full public hearing;

3. The grant of an exemption to the applicants herein without according all interested parties in-

cluding regulated freight forwarders an opportunity for a full hearing is not in the public interest inasmuch as such an exemption might well lead to the demoralization and consequent destruction of the registered air freight forwarder industry;

4. The Board has concurrently instituted a formal investigation into the renewal and/or amendment of Part 296 of the Economic Regulations, which will encompass the issues involved in the application herein and to which proceeding all regulated freight forwarders as well as the applicants will be made parties. This proceeding will include a full and complete hearing at which all interested persons including Airborne and other registered forwarders, as well as the applicants, will be given an opportunity to present evidence relevant to applicants' request for an exemption;

5. The grant of an exemption herein to the applicants would prejudge, without complete facts or an adequate record, the issues in the investigation contemplated in finding paragraph 4 above;

6. Denial of the application herein is consistent with past Board policy whereby the Board by a series of enforcement actions against unauthorized forwarding activities incident to shippers' associations has sought to protect regulated air freight forwarders from the unregulated competition of shippers' associations;

7. It is not in the public interest at this time to relieve the applicants from the provisions of Title IV of the Civil Aeronautics Act of 1938, as amended;

8. In view of paragraph first numbered 6 hereinabove, it is unnecessary and not in the public interest to consolidate Docket No. 5037 with Docket No. 4902;

It is Ordered that:

1. The application herein for an exemption, Docket No. 5037, be and it hereby is denied without prejudice to the renewal thereof in the formal investigation contemplated by finding paragraph 4 above;

2. The motion of the applicants for consolidation of Docket No. 5037 with Docket No. 4902 be and it hereby is denied.

3. Except to the extent specifically granted herein, all motions and other prayers for relief be and they hereby are denied.

By the Civil Aeronautics Board:

[Seal] /s/ FRED A. TOOMBS,
Acting Secretary.

United States of America, Civil Aeronautics Board,
Washington, D. C.

Order No. E-7198

[Title of Cause.]

ORDER POSTPOINING EFFECTIVE DATE OF CEASE AND DESIST ORDER

On February 5, 1953, the Board entered herein its order Serial No. E-7139 which, effective March

7, 1953, directed Consolidated Flower Shipments, Inc.-Bay Area, et al., to cease and desist from engaging indirectly in air transportation in violation of Section 401(a) of the Act. On February 24, 1953, Consolidated Flower Shipments filed herein a petition for reconsideration, and for a stay of the effective date of the cease and desist order until disposition of the petition for reconsideration or until the conclusion of the investigation in Renewal of Part 296 of the Economic Regulations Investigation of Indirect Carriage of Property, Docket No. 5947. On March 2, 1953, an Answer opposing this petition was filed by Airborne Flower and Freight Traffic, Inc.

After consideration of the foregoing documents, the Board finds that the petition for reconsideration probably cannot be considered and ruled upon prior to March 7, 1953, and that a stay of the effective date of the cease and desist order will be appropriate and in the public interest. The Board further finds that the question of whether the cease and desist order should be stayed pending completion of the proceedings in Docket No. 5947 should be considered in connection with the petition for reconsideration.

It is Ordered that, the effective date of Order Serial No. E-7139 be and it hereby is stayed and postponed pending consideration by the Board of said petition for reconsideration and for a stay of such order until completion of the proceedings in Docket No. 5947, and, in the event that said petition

is denied by the Board, until 30 days after the date of such denial.

By the Civil Aeronautics Board:

[Seal] /s/ M. C. MULLIGAN,
Secretary.

United States of America, Civil Aeronautics Board,
Washington, D. C.

Order No. E-7269

[Title of Cause.]

OPINION AND ORDER ON RECONSIDERATION AND REQUEST FOR STAY

On February 5, 1953, the Board issued its opinion and order in this proceeding (Order No. E-7139), requiring Consolidated Flower Shipments, Inc.-Bay Area (Bay Area), to cease and desist from engaging indirectly in air transportation in violation of section 401(a) of the Act. Respondents have filed a combined petition for reconsideration and for a stay of the cease and desist order. Airborne Flower & Freight Traffic, Inc., (Airborne) has filed an answer thereto. In the main the petition for reconsideration repeats arguments previously considered and rejected by us. It is unnecessary for us to reiterate our reasons for rejecting them now.

Respondents concede the correctness of our refusal to consider the alleged amendment of Bay Area's corporate charter to bring it under the Non-

profit Cooperative Association Act of the State of California. Despite this concession, respondents contend that we should consider the effect of the law under which the alleged reorganization occurred, which limits membership in Bay Area to producers of horticultural or farm products. In view of the limitation thus imposed upon Bay Area's membership, respondents contend that we erred in concluding that membership is readily attainable. Further, since the stated purpose of the law is to encourage farmers "to attain a superior and more direct system of marketing" and "to make the distribution of agricultural products between producers and consumers as direct as can efficiently be done," respondents charge that it was error for us to conclude that eligibility for Bay Area's service is the sole purpose of membership in the association.

It should be noted that respondents at no time requested that the record be reopened to present evidence of Bay Area's alleged new status. The other parties to the proceeding therefore have had no opportunity of examining the effect, if any, of such reorganization.[1] Even now, respondents do not request that the record be reopened. Aside from the procedural problem, however, we find that Bay Area's contention is without merit.

Even if we assume that under California law membership in Bay Area is now limited to producers of horticultural or farm products, that fact

---

[1]See North Atlantic Certificate Renewal Case, Order No. E-6560, footnote 12.

does not detract from our holding that membership is readily attainable. It merely indicates that membership is limited to a class. However, within the class membership is still readily attainable. As the Examiner points out in the Initial Decision (see p. 11a, Appendix), shippers of flowers alone would represent a substantial portion of the air shipping public sufficient to make Bay Area a common carrier by virtue of its holding out its service to members of this class. Similarly, the fact that the law under which Bay Area is alleged to have been reorganized states its purpose or policy to be the encouragement of superior and direct marketing does not affect the validity of our holding that eligibility for Bay Area's services is the sole purpose of membership. The rule that the determination whether a carrier is a common carrier depends, not upon what its charter says, but upon the manner of its operations, would obviously apply to a consideration of the statutory policy under which a carrier was organized. The record in the instant proceeding amply demonstrates that eligibility for Bay Area's consolidation and forwarding services is the sole inducement for membership.

Respondents contend further that our order which requires Bay Area to "cease and desist from engaging indirectly in air transportation in violation of section 401(a) of the Act" is not sufficiently definite and certain; that without clear and precise specification of the acts, operations and practices upon which we would hold that Bay Area is engaging indirectly in air transportation in violation

of section 401(a) of the Act, the order is erroneous.

We are satisfied that the cease and desist order, limited to Bay Area's engaging indirectly in air transportation in violation of section 401(a) of the Act, is sufficiently definite. Any possible doubt as to what constitutes indirect air transportation can be resolved by reference to the opinion upon which the order is based and which sets forth (in the Appendix) in detail Bay Area's operations which we found to constitute indirect air transporation of property (p. 5, Opinion). In this regard, the order resembles the Interstate Commerce Commission order upheld by the Court in Brady Transfer & Storage Co. v. United States, 80 F. Supp. 110, affirmed, 335 U. S. 875. In that case, the order required the respondent to cease and desist from "the motor carrier operations which it is found in said report now to be conducting * * *." Rejecting respondent's contention that the order was invalid for uncertainty, the court said (80 F. Supp. at p. 118):

> "* * * the Commission has gone to considerable lengths in advising Brady and other carriers of what factors may be relevant to a determination by the carrier of its rights under an irregular route certificate. It cannot, as heretofore observed, lay down any hard and fast inelastic rule by which every case can be automatically determined. The order is sufficiently definite and certain that it is not invalid for want thereof."

In the instant proceeding it is inconceivable that, after a full hearing in which they participated vigorously and after the issuance of a detailed opinion, respondents should be unaware of the practices and conduct which constitute engaging indirectly in air transportation.

Attached to the petition for reconsideration is a petition for a stay of the cease and desist order pending reconsideration[2] or until the conclusion of the investigation in Docket No. 5947 or until the final disposition of the application for an exemption order filed or to be filed by respondents. In support thereof, respondents contend that the sudden termination of Bay Area's services, by which in excess of 50 per cent of the flower movement by air from the San Francisco Bay area region is handled, would have such adverse economic effect upon the entire flower industry in that area as to result in irreparable loss and injury to members and the industry as a whole; that this would work a grave injustice upon Bay Area's members if, upon the termination of the investigation in Docket No. 5947, it be determined that Bay Area's application for exemption should be granted in the public interest.[3]

We are not impressed with these arguments which assume that the cease and desist order re-

[2]By Order No. E-7198, adopted March 3, 1953, we stayed the cease and desist order pending consideration of the petition for reconsideration and for a stay, and in the event said petition is denied, until 30 days after the date of such denial.

[3]It is apparent that respondents have misconceived their remedy. Since it is clear from the record that Bay Area has been operating without

authority and the cease and desist order was propquires Bay Area to suddenly terminate its services. It should be noted that the cease and desist order does not compel Bay Area to refrain unqualifiedly from engaging in indirect air transportation, but only to refrain from doing so in violation of section 401(a) of the Act—that is, without securing the requisite authority from the Board in the form of a letter of registration as an air freight forwarder pursuant to Part 296 of the Board's Economic Regulations. This has always been its obligation. Yet Bay Area has failed to apply for a letter of registration as an air freight forwarder and still refuses to do so.

In this connection, it is pertinent to observe that Bay Area can qualify for a letter of registration as an air freight forwarder under Part 296 of the Board's Economic Regulations without an unduly burdensome or significant change in its operations. It can continue to limit its operations to handling flowers and providing special services required for them. While Bay Area would be required to provide cargo and public liability insurance pursuant to Sec. 296.15, this obligation would not appear to impose an undue hardship upon the association. The record shows that Bay Area currently carries

---

erly issued, it would be inappropriate for us to stay that order until the investigation is completed. Respondents should have sought reconsideration of our order denying Bay Area's request for an exemption (Order No. E-7140). However, in view of all the circumstances, we believe we are warranted in looking at the substance of the relief sought, rather than the form in which the request is presented.

motor carrier cargo liability insurance and purchases excess valuation for consolidated shipments from direct air carriers. The record also shows that for a period of about one year, Bay Area carried a policy of insurance against all risks of loss or damage to cargo carried by it.

Nor should the requirements of filing reports and filing a tariff prove unduly burdensome to Bay Area. True, the filing of a tariff would prevent Bay Area from engaging in its current practice of prorating the cost of consolidated shipments among the participating shippers. This, however, does not mean that the member shippers would thereby be deprived of the benefits which they now enjoy, for we are satisfied that Bay Area can file tariffs set at levels which over a representative period of time will give the shippers the advantages of the volume rates on the consolidated shipments of which their packages are a part.[4]

Even if Bay Area were to terminate its operations, it does not follow that such action would have the serious adverse effect upon members of Bay Area or the industry as a whole, which respondents allege. The fact that Bay Area handles a substantial flower movement by air from the Bay Area does not mean that the operations of shippers who do not use Bay Area are not profitable; other-

[4]For example, studies of flower shipments could be made from time to time to determine the lowest rate for the average daily consolidated flower shipments from the Bay region to all destinations. These rates could be designed to meet volume requirements on a seasonal basis.

wise Bay Area would have the business of all of the San Francisco flower shippers. Since a substantial proportion of flower shipments by air from the Bay region is not handled by Bay Area, it is difficult to see how termination of Bay Area's services would have an adverse economic effect upon the entire flower industry in that area. Nor would cessation of Bay Area's operations seriously affect its members. There is no claim that with Bay Area out of business its members would be without adequate air service. On the contrary, the record shows that for a ten-day period in 1950, during which Bay Area was completely inactive, Airborne handled all of Bay Area's shipments. In this connection it is pertinent to note that several members of Bay Area[5] do not utilize Bay Area's services exclusively, and at least two of them[6] ship regularly via Airborne and make only occasional or intermittent use of Bay Area's services. In view of the foregoing, respondent's contention is not persuasive.

We deem it significant that Bay Area is in direct competition with air freight forwarders who are common carriers and, as such, subject to regulation under the Act. We do not believe that Congress intended that non-profit associations competing directly with carriers subject to regulation should escape regulation merely because of their form of

---

[5]Including Western Wholesale Florist, The Zappettini Company, Nuckton Company, Golden Gate Wholesale, A. G. Enoch Company, Amling Floral Supply, and Boodell & Co.

---

[6]Amling Floral Supply and Boodel & Co.

organization. For while the instant proceeding involves but one non-profit corporation, we are not required to close our eyes to the inevitable consequence, should we exempt Bay Area from regulation, even for the period of time necessary to decide Docket No. 5947. It is readily apparent that the device employed by the members of Bay Area could be adopted by shippers wherever air freight forwarders are now operating, with the result that there might eventually be as many, if not more, associations than there are regulated air freight forwarders. And these associations would be entitled to exemption on the same basis as Bay Area. Under these circumstances, regulation of air freight forwarders would be but an idle gesture, for experience has shown that an agency cannot effectively protect the public interest where part of an industry is subject to regulation, while another large segment has been exempt from regulation.

Nor is it difficult to foresee the economic effect of unregulated competition upon the regulated forwarders. Already Bay Area's competition has had an adverse effect upon Airborne, a duly registered air freight forwarder which operates in the same area and which is subject to the Act and to the Board's regulations. Should the concept of associations of shippers spread, as it doubtless would were we to exempt Bay Area, the impact upon the air forwarding industry might well be disastrous. Indeed, it is quite possible that the competition of such associations would drive the regulated forwarders out of business, thus depriving the general

public of services which the shippers' associations do not offer or perform and denying to air transportation the development of air cargo to which forwarders would contribute.

This is not to say that we are committed to the policy of regulating associations of shippers in the same manner as we regulate other freight forwarders. This is a matter for future determination in the investigation proceeding (Docket No. 5947). Nor are we committed to the policy of protecting air freight forwarders who operate for a profit. Again, the future status of such freight forwarders likewise is a matter for determination in that proceeding. What we are doing here is recognizing the fact that many air freight forwarders have obtained letters of registration from the Board, and have entered business and made substantial capital investments in reliance upon our decision in the Air Freight Forwarder Case, 9 C.A.B. 473, wherein we promulgated the conditions under which they could operate until October 15, 1953. We believe it in the public interest in this instance to require all who enter the field of indirect air transportation, even though they be non-profit shippers' associations, to do so upon the same terms and conditions until we have re-examined the entire problem in the forthcoming investigation.

In view of the foregoing circumstances, the petition for a stay pending the investigation, or until final disposition of an application for exemption, should be denied.

Therefore, It Is Ordered, That the petition for reconsideration and the petition for stay of the cease and desist order (except to the extent already granted by Order No. E-7198) be and they hereby are denied.

Ryan, Chairman, Lee, Adams, and Gurney, Members of the Board, concurred in the above opinion and order.

[Seal] /s/ M. C. MULLIGAN,
Secretary.

United States of America, Civil Aeronautics Board, Washington, D. C.

Docket No. 5947

In the Matter of

The Renewal of Part 296 of the Economic Regulations and an Investigation of Indirect Air Carriage of Property.

Adopted by the Civil Aeronautics Board at its office in Washington, D. C. on the 5th day of February, 1953

Order No. E-7141

ORDER OF INVESTIGATION

The Board promulgated Part 296 of the Economic Regulations after finding in the Air Freight Forwarder Case, 9 CAB 473 (1948) that the services of freight forwarders should be permitted on a tem-

porary basis and for a limited period during which experience could be developed upon which a permanent policy might be soundly determined. Part 296 of the Economic Regulations expires October 15, 1953; the trial period for forwarders, therefore, as envisaged by the Board in the Air Freight Forwarder Case, is drawing to a close.

The services now performed and to be performed by air carriers indirectly engaged in the air transportation of property present problems of unique and novel character in the field of air transportation. The imminent expiration of the aforesaid Part 296, and the holding by the Board in Docket 4902 that a shippers' association may be an indirect air carrier, requires a thorough investigation at this time into the problems of indirect air carriers of property as a means of analyzing the record of forwarder experience which has developed under Part 296, with a view to determining a sound permanent policy for the future of the indirect carrier (property) and for the forwarding industry. Particularly, further inquiry of a formal nature is now needed to determine the extent to which there may be a continuing need for air freight forwarders in view of the burgeoning of other indirect air carriers of property, e.g., so-called shippers' associations and shippers' cargo agents, and the extent to which there is a need for classification of all indirect air carriers of property, with suitable regulation to insure fullest development of each class. No question is raised at this time with respect to the activi-

ties of Railway Express Agency, Inc. (REA) which is authorized, under the exemption provision of section 1(2), to carry on its operations for an indefinite period, or until such time as the Board may determine that such operations are no longer in the public interest. Also, REA is currently engaged in negotiations with the direct air carriers with a view to the filing with us of satisfactory revised air express agreements which we directed in the Air Freight Forwarder Case. Accordingly, we are excluding REA from the scope of this investigation.

The Board, acting pursuant to sections 1(2), 205(a), 416(a) and 1002(b) of the Civil Aeronautics Act of 1938, as amended, and deeming its action necessary to carry out the provisions of said Act, and to exercise and perform its powers and duties thereunder:

It Is Ordered That:

1. An investigation be and it hereby is instituted by the Board into all matters relating to and concerning services of air carriers indirectly engaged in the air transportation of property. Such investigation shall include, inter alia, an inquiry into the following matters:

(a) The question of whether the public interest requires the renewal and/or amendment of Part 296 of the Economic Regulations;

(b) The extent to which there is a need for the classification of indirect air carriers, and the extent to which there is a need for sub-classifications

within such possible indirect air carrier classifications;

(c) The extent to which existing requirements of law should be modified in their application to such classifications;

(d) The extent to which there is or may be a general need for indirect air carrier services, including the following: air freight forwarders using direct carriers, air freight forwarders using indirect carriers, shippers' associations, air express forwarders (other than REA), and other similar indirect air carrier services;

(e) The types of operation best adapted to performance of the services required to meet such need;

(f) The extent to which other activities should be engaged in by such indirect air carriers to meet such need;

(g) The extent to which indirect air carrier operations should be subjected to restrictions to prevent discriminatory and destructive practices and the nature of any such restrictions;

2. The following be and they hereby are made parties to this proceeding:

(a) every holder of a letter of registration as an air freight forwarder (domestic);

(b) every applicant for a letter of registration as an air freight forwarder (domestic);

(c) in addition thereto, the following:

(1) Manufacturers and Wholesalers Association Shipping Conference, c/o Leslie Spelman, Koret of

California, 26 O'Farrell St., San Francisco, California;

(2) Carpel-Textile Association, Inc., c/o R. L. Corn, Room 530, 610 South Main, Los Angeles 14, California;

(3) Flower Consolidators of Southern California, 750 Maple Avenue, Los Angeles 14, California;

(4) Consolidated Flower Shipments, Inc., Bay Area, c/o John C. Barulich, San Francisco Municipal Airport, South San Francisco, California;

(5) Fashion Air Cooperative Association, 475-11th Avenue, New York, New York;

(6) John C. Barulich, c/o Consolidated Flower Shipments, Inc., Bay Area, San Francisco Municipal Airport, South San Francisco, California;

(7) Metropolitan Traffic and Receiving Unit, c/o Mr. O'Grady, Traffic Manager, Saks Fifth Avenue, New York, New York;

(8) Kansas City Shippers Association, c/o Mr. Higginbotham, Traffic Manager, Jones Store, Kansas City, Missouri;

(9) New England Carnation Growers Association, Inc., Logan International Airport, East Boston, Massachusetts;

(10) North Atlantic Lobster Institute, Portland, Maine;

(11) Boston Flower Exchange, Inc., Boston, Massachusetts.

3. This proceeding be and it hereby is set down for hearing before an examiner of the Board at a

time and place hereafter to be designated, at which all interested parties will be afforded an opportunity to present their views and any relevant data relating to the subject matter of this proceeding;

4. This order be published in the Federal Register.

By the Civil Aeronautics Board:

[Seal] /s/ FRED A. TOOMBS,
Acting Secretary.

In the United States Court of Appeals
for the Ninth Circuit

No. 13727

CONSOLIDATED FLOWER SHIPMENTS, INC.-BAY AREA,

Petitioner,

vs.

CIVIL AERONAUTICS BOARD and AIRBORNE FLOWER AND FREIGHT TRAFFIC, INC.,

Respondents.

CERTIFICATION OF TRANSCRIPT OF RECORD

It Is Hereby Certified that, subject to the exceptions noted below, the attached materials numbered from page 1 to page 2327, inclusive, constitute a

true copy of the record upon which were entered the Board's Orders Serial Numbers E-7139, dated February 2, 1953, and E-7269, dated April 1, 1953, together with briefs, transcripts of argument, and certain memoranda in the nature of briefs and arguments, which latter materials were considered by the Board insofar as based on evidence contained in the record, or on facts and circumstances entitled to official notice, in connection with the entry of the orders described.

Omitted from the certified transcript are Enforcement Attorney's Exhibits Nos. 325 and 326, copies of income tax returns of Mr. and Mrs. John C. Barulich, which, upon motion duly made, were withheld from public disclosure by the Board's Order Serial Number E-6306 of April 9, 1952, p. 1134 of the certified transcript. These materials are believed unnecessary to the Court's review of the issues presented by this case. To the extent that they may be deemed pertinent, however, the exhibits will be transmitted to the Court upon request, in such manner as to maintain their confidential status.

By the Civil Aeronautics Board:

[Seal] /s/ M. C. MULLIGAN,
Secretary.

[Endorsed]: No. 13727. United States Court of Appeals for the Ninth Circuit. Consolidated Flower Shipments, Inc., Bay Area, Petitioner, vs. Civil Aeronautics Board and Airborne Flower and Freight Traffic, Inc., Respondents. Transcript of Record. Petition to Review an Order of the Civil Aeronautics Board.

Filed May 18, 1953.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

[Title of Court of Appeals and Cause.]

PETITION OF CONSOLIDATED FLOWER SHIPMENTS, INC.-BAY AREA FOR REVIEW OF AN ORDER OF THE CIVIL AERONAUTICS BOARD

To the Honorable Justices of the United States Court of Appeals for the Ninth Circuit:

Consolidated Flower Shipments, Inc.-Bay Area presents this petition for review of, and to set aside an Order of the Civil Aeronautics Board, dated February 5th, 1953, Serial No. E-7139 and E-7269, dated April 1st, 1953, in Docket No. 4902.

I.

Background of Orders Under Review

Petitioner is a Nonprofit Cooperative Association duly incorporated and organized pursuant to the

provisions of §1190 et seq. of the Agricultural Code of the State of California, whose primary purposes, pursuant to such authority, is to arrange for the handling and transportation of products of its members in good standing by shipping their flowers and decorative greens to consignees or purchasers thereof at points and places in interstate commerce via the services of direct air carriers and surface carriers, which purposes and functions petitioner performs solely for the benefit of its members on a nonprofit basis, under the enabling provisions of §1190 et seq. of the Agricultural Code of the State of California.

Docket No. 4902 was instituted by the Board to determine whether petitioner has been or is now engaged indirectly in air transportation as a common carrier in violation of §401a of the Civil Aeronautics Act of 1938 as amended (hereinafter referred to as the Act), and Part 296 of the Board's Economic Regulations.

After due notice of hearing and initial decision of the Examiner, the Board issued its opinion and order, serial No. E-7139, dated February 5th, 1953, providing in part as follows:

"1. Consolidated Flower Shipments, Inc.-Bay Area, its successors and assigns, and John C. Barulich, its executive-secretary, and its officers, directors, agents and representatives cease and desist from engaging indirectly in air transportation in violation of section 401 (a) of the Act.

* * *

"3. This order shall become effective 12:01 a.m. on March 7, 1953."

Concurrently with said opinion and order, the Board on the same day decided a related and then pending application of petitioner for an exemption order, assigned Docket No. 5037, and on February 5th, 1953, by order serial No. E-7140, denied said application for an exemption order without prejudice to the renewal thereof in a formal investigation intended to encompass the issues involved in Docket No. 4902 and 5037, and named petitioner herein as respondent in said investigation, assigned Docket No. 5247, at which all interested parties would be given an opportunity to present evidence relative to petitioner's application for an exemption order, if petitioner is held to be an indirect air carrier and subject to the jurisdiction of the Board.

On February 24th, 1953, petitioner filed with the Civil Aeronautics Board a Petition for Reconsideration, Rehearing or Reargument and Petition for Stay of the Effective Date of the Order under Review. On March 3rd, 1953, the Board issued its Order No. Serial E-7198, staying said Order under review until thirty (30) days after the determination of petitioner's petition for reconsideration and for stay of the order under review, until completion of the proceedings in Docket No. 5947.

On April 1st, 1953, the Board issued its order Serial No. E-7269, denying said petition for Reconsideration and denying said petition for a stay of the effective date of said Cease and Desist Order,

pending the conclusion on the proceedings in Docket No. 5947 or until the final disposition of an application for exemption order, to be filed therein. In accordance with the order of the Board said Cease and Desist Order will become effective May 1st, 1953, unless otherwise stayed.

II.

Issues for Review

The issues to be resolved under this petition for review are:

1. Did the Board commit legal error in assuming jurisdiction over the activities of petitioner?

2. Did the Board commit legal error in concluding that petitioner, its executive secretary and its officers, directors, agents and representatives have been, or are, engaging indirectly in air transportation, in violation of §401(a) of the Act?

3. Did the Board commit legal error in concluding that petitioner serves, or holds itself out to serve, the general public as a common carrier for compensation or hire?

4. Did the Board commit legal error in concluding that petitioner's service is available indiscriminately to any shipper who may wish to use it?

5. Did the Board commit legal error in concluding that petitioner undertakes to serve or serves the receivers or consignees of flower shipments of the members of petitioner?

6. Did the Board commit legal error in concluding that the payment, in some instances, of the transportation charges by the receiver or consignee, constitutes a holding out to the general public to provide transportation of property for compensation as an indirect air common carrier?

7. Did the Board commit legal error in concluding that petitioner is responsible to the general public for the transportation of shipments of flowers from point of receipt to point of destination?

8. Did the Board commit legal error in failing, neglecting or refusing to specifically define the alleged acts, practices and activities of petitioner, its executive secretary, and its officers, directors, agents and representatives which constitute alleged violations of §401(a) of the Act and the Board's Economic Regulations thereunder?

9. Did the Board commit legal error or abuse its discretionary power under §1005(d) of the Act in refusing to stay the effective date of said order Serial E-7139 until the conclusion of Appellate procedures or until the conclusion of the investigation in Docket No. 5947 and the final disposition of an application for exemption order to be filed therein?

III.

Comments on Issues for Review

Issue No. 1 concerns the basic nature of and the limitations upon, the jurisdiction conferred upon the Board by the Act.

Issues 2 to 7 inclusive concern the determination of the status of petitioner and the definition under the Act of:

1. Air carrier.
2. Common carrier freight forwarder.
3. Indirect air common carrier.

and whether, on consideration of the entire record, it can be validly concluded as a matter of law that petitioner is in any manner subject to the jurisdiction of the Board as an indirect air common carrier under the Act and Part 296 of the Board's Economic Regulations.

Issue 8 concerns the legal error committed by the Board in failing to definitively set forth the specific acts, conduct and practices of petitioner, alleged to be in violation of §401(a) of the Act.

Issue 9 concerns the granting of interlocutory relief pending the completion of Appellate procedures and the abuse of discretion on the part of the Board in failing to accord such relief required in the public interest.

The nine issues involved in this petition for review are of major importance, not only to petitioner as a bona fide nonprofit cooperative association of flower growers and producers, but to the entire flower industry in the San Francisco Bay area, affecting the economy and financial stability of the members of petitioner.

IV.

Basis for Jurisdiction

This petition is filed pursuant to the provisions of §1006(a) and (d) of the Civil Aeronautics Act. (52 Stat. 973; 49 U.S.C. 401.)

These provisions of the Act provide in part that any order issued by the Board shall be subject to review by the Circuit Court of Appeals for the Circuit where the petitioner resides or has its principal place of business, or in the United States Court of Appeals for the District of Columbia.

Petitioner is a California corporation, incorporated under the provisions of the Nonprofit Cooperative Association Act of the Agricultural Code of the State of California, above mentioned, and has its principal place of business as such in the County of San Mateo, State of California, at the San Francisco Municipal Airport.

V.

Relief Requested

Petitioner requests relief under this petition for review in the form of order or orders of this court:

1. Directing that the order of the Board under review be set aside as in excess of jurisdiction, or otherwise modified in such manner as may be necessary to correct the legal errors committed by the Board;

2. Directing the Board to comply with such interlocutory relief which may appear to be appro-

priate in response to any motions or intermediate proceeding put to this court by petitioner in the manner provided by law; and

3. Granting such other relief to petitioner as the law and the premises may justify.

Respectfully submitted,

CONSOLIDATED FLOWER SHIPMENTS, INC.-BAY AREA.

By /s/ ANTONIO J. GAUDIO,
Attorney for Petitioner.

[Endorsed]: Filed April 8, 1953.

United States Court of Appeals
for the Ninth Circuit

No. 13,727

CONSOLIDATED FLOWER SHIPMENTS, INC.-BAY AREA,

Petitioner,

vs.

CIVIL AERONAUTICS BOARD AND AIR-BORNE FLOWER AND FREIGHT TRAFFIC, INC.,

Respondents.

June 30, 1953

Upon Motion for Leave to File Petition for Review

Before: Denman, Chief Judge, and
Stephens and Orr, Circuit Judges.

Denman, Chief Judge:

OPINION

Petitioner sought a review here of an order of the Civil Aeronautics Board which on June 12, 1953, we ordered dismissed because brought within 60 days after the entry of a denial of a motion to reconsider the order but not within the 60 days from the entry of the order required by 49 U.S.C. § 646 (a), providing:

> "(a) Any order, affirmative or negative, issued by the Board under this chapter, except any order in respect of any foreign air carrier

> subject to the approval of the President as provided in section 601 of this title, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore."

Petitioner now moves our permission to file the same petition and offers the following as "reasonable grounds" for invoking our action.

The law of this circuit at the time petitioner was considering its appeal procedure, as established in three of its decisions, was that under the Civil Aeronautical law jurisdiction was obtained by this court by seeking its review within 60 days after the entry of the Board's denial of a petition for rehearing on its order. Western Air Lines v. C.A.B., 196 F. 2d 933 (Cir. 9), cert. den. 344 U.S. 875; Southwest Air Lines v. C.A.B., 196 F. 2d 937 (Cir. 9); Western Air Lines v. C.A.B., 194 F. 2d 21 (Cir. 9). As seen, it was not until June 12, 1953, over two months after petitioner had sought review relying on the law as so established, that we changed the law of the circuit by the above decision.

We think that petitioner's reliance on the established law of the circuit at the time it first sought a review is a "reasonable ground" for the failure

to seek a review of the original order in the 60 day period from its entry.

At the hearing of the motion the parties stipulated that if it were granted the petition for review which we dismissed shall be deemed to have been this day filed and petitioner's further motion for a stay of the Board's order pending the consideration of the merits of the review shall be deemed submitted.

Upon the facts stated in the affidavits for the stay and those stated by the Board and Airborne Flower and Freight Traffic, Inc., we find that irreparable harm will be caused the petitioner unless the stay be granted.

The motion to file the petition for review is granted and the petition is deemed filed as of this date. The Board's order is ordered stayed until the decision on the merits of the petition for review.

[Endorsed] Opinion. Filed June 30, 1953. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

STIPULATION

It Is Stipulated that all exhibits received in evidence at the oral hearing before the Civil Aeronautics Board in the above-entitled matter, which exhibits constitute a part of the certified record filed herein by the Civil Aeronautics Board, be considered a part of the record on review in their original form as so filed without reproduction.

Dated: July 15, 1953.

/s/ JOHN H. WARNER,
Acting General Counsel, Civil Aeronautics Board, Respondent.

/s/ RALPH SPRITZER,
Special Assistant to the Attorney General, Department of Justice.

/s/ ANTONIO J. GAUDIO,
Attorney for Consolidated Flower Shipments, Inc.-Bay Area, Petitioner.

/s/ PAUL T. WOLF,
Attorney for Airborne Flower and Freight Traffic, Inc., Respondent.

The foregoing stipulation is approved.

/s/ WM. E. ORR,
/s/ HOMER T. BONE,
U. S. Circuit Judges.

[Endorsed]: Filed July 21, 1953.

[Title of Court of Appeals and Cause.]

PETITIONER'S POINTS OF REVIEW

To the Clerk of the Above-Entitled Court and to Respondents:

Pursuant to Rule 19(b) of the Rules, petitioner will rely on the following points of review.

I.

The findings and conclusions of the Board that Bay Area has held itself out and continues to hold itself out to the public as a common carrier for compensation and is an air carrier as defined in §1(2) of the Act, and is engaged indirectly in the transportation of property by air, are erroneous.

II.

Bay Area and the service it performs is the creature and result of mutual and cooperative action on the part of the members thereof, and is not a holding out of service to the general public for compensation or hire.

III.

The order of the Board, dated February 5th, 1953, entered herein (E-7139) is void for uncertainty in that it is not definitive of the acts, conduct and practices allegedly investing common carrier status on petitioner.

IV.

Respondent Board abused its discretion under §105(d) of the Civil Aeronautics Act, in failing,

neglecting or refusing to stay its order under review during the pendency of an investigation in the renewal of part 296 of its Economic Regulations, assigned Docket 5947.

* * *

Dated: July 17, 1953.

/s/ ANTONIO J. GAUDIO.

[Endorsed]: Filed July 20, 1953.

No. 13727

United States
Court of Appeals
For the Ninth Circuit.

CONSOLIDATED FLOWER SHIPMENTS, INC.-BAY AREA,

Petitioner,

vs.

CIVIL AERONAUTICS BOARD and AIR-BORNE FLOWER AND FREIGHT TRAFFIC, INC.

Respondents.

Transcript of Record

Volume II
(Pages 427 to 569)

Petition to Review an Order of the Civil Aeronautics Board.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—12-18-53

No. 13727

United States
Court of Appeals
For the Ninth Circuit.

CONSOLIDATED FLOWER SHIPMENTS, INC.-BAY AREA,

Petitioner,

vs.

CIVIL AERONAUTICS BOARD and AIR-BORNE FLOWER AND FREIGHT TRAFFIC, INC.

Respondents.

Transcript of Record

Volume II
(Pages 427 to 569)

Petition to Review an Order of the Civil Aeronautics Board.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—12-18-53

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

United States of America, Civil Aeronautics Board
Washngton, D. C.

Docket No. 4902, et al.

In the Matter of:

CONSOLIDATED FLOWER SHIPMENTS, INC., BAY AREA; JOHN C. BARULICH, WILLIAM ZAPPETTINI.

February 29, 1952.

The above-entitled matter came on for hearing, pursuant to adjournment, at 10:00 a.m.

Before: Richard A. Walsh, Examiner.

Appearances:

(As heretofore noted.)

* * *

ALFRED G. ENOCH

was called as a witness for and on behalf of Bay Area, and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Gaudio:

Q. Mr. Enoch, will you state your full name, occupation and address?

A. Alfred Enoch, wholesale florist.

Do you want the business address?

Q. Yes. A. Los Altos, California.

Q. Are you what is known as a grower of flowers, as well as just a wholesaler?

A. We have interests in growing, leases of fields, and shipping.

Q. How long have you been in that business or occupation?

A. My own personal business, since the first of 1947, I believe.

Q. Since that time, have you had occasion to ship your products to eastern markets via air [819*] carriers? A. Yes, I have.

Q. Are you a member of Consolidated Flower Shipments, Inc.-Bay Area? A. Yes, I am.

Q. Do you hold any office?

A. Yes, I do, Board of Directors.

Q. You are a member of the Board of Directors?

A. Yes.

Q. Have you had any other office during its organization? A. No.

***Page numbering appearing at top of page of original Reporter's Transcript of Record.**

(Testimony of Alfred G. Enoch.)

Q. Have you paid any membership dues or assessments as a member of Bay Area?

A. Yes, what the Bylaws call for.

Q. And what is that?

A. I believe it is $50 a year, now.

Q. Were you one of the original members of Bay Area as such? A. Yes, I was.

Mr. Gaudio: Mr. Examiner, I learned only this morning, after discussion with counsel, that certified copies of the special meeting of the Board of Directors of Bay Area held February 9, 1951, were not in my file; they had been sent to Redwood City for filing in the office of the County Clerk of the County of San Mateo, in accordance with the local law; but, I have displayed here a copy to counsel, and would like to read from that for this [820] moment, and then ask that a certified copy in due course be incorporated as Respondent's next exhibit in order, which would be 10, I believe.

Examiner Walsh: That is right, 10.

Mr. Gaudio: Mr. Examiner, also attached to this is a statement which I had previously submitted to the Enforcement Attorney, dated February 13, 1951, under the general heading, "Corporate Status," over my signature, which I will present at this time as part of Exhibit 10.

Examiner Walsh: Do you wish to have that marked for identification?

Mr. Gaudio: And offer it in evidence at this time.

Examiner Walsh: Any objection?

(Testimony of Alfred G. Enoch.)

Mr. Wolf: No objection.

Examiner Walsh: You are referring to the entire exhibit, are you not?

Mr. Gaudio: Yes, this would be the entire exhibit.

Examiner Walsh: Identified as Bay Area's Exhibit 10, with the attachment letter, "Corporate Status," signed by Mr. Gaudio, are received in evidence without objection.

(The documents above referred to were marked for identification as Bay Area's Exhibit No. 10, and were received in evidence.)

Q. (By Mr. Gaudio): Were you present at the meeting of the Board of Directors on that occasion, February 9, 1951? [821]

A. I would say I was. Yes, I would say I was there.

Mr. Gaudio: I would like to read for the record at this time minutes of the specal meeting of the Board of Directors of Consolidated Flower Shipments, Inc.-Bay Area, South San Francisco, California, February 9, 1951, 8:00 o'clock, p.m.

I am just extracting from this.

Present: William Zappettini, John Nuckton, Alfred Enoch—the present witness—Absent: James Bonaccorsi, C. J. Boodel.

After the usual preambles, it reads:

"Upon motion duly made, seconded and unanimously carried, it was resolved that Article 1-D of the Articles of Incorporation of Consolidated

(Testimony of Alfred G. Enoch.)

Flower Shipments, Inc.-Bay Area, be amended, changed and altered so as to read as follows:

"'D. To purchase, lease, hold, sell, develop, mortgage, convey, or otherwise acquire or dispose of real or personal property.'"

The resolution is duly subscribed by John Nuckton, then Secretary, approved by William Zappettini, then Chairman of the Board of Directors. And, as a part of that same exhibit, the written consent of members to amendment to the Articles of Incorporation, which has just previously been read, showing the names of the members subscribing the same, as of July 2, 1951.

Q. (By Mr. Gaudio): You mentioned the payment of dues and assessments, Mr. Enoch. Is it true that under its original incorporation dues [822] were not a prerequisite to membership?

A. That is right.

Q. And that the dues and assessments were promulgated pursuant to the resolution of the Board of Directors of which you were a member at the time? A. Yes.

Q. Do you have any personal knowledge of the intention of the handling of flowers in interstate commerce by air carrier even prior to Bay Area?

A. Yes, quite some time back.

Q. Would you describe what time and under what circumstances that developed?

A. I believe I helped load the first planeload of flowers that ever left San Francisco as a total load.

(Testimony of Alfred G. Enoch.)

I can't remember for sure how far back it was, but it was a chartered plane from United Air Lines, a DC-3 that they had removed the seats from, and we stuffed flowers in it. But it didn't get past Salt Lake City, so I guess it didn't mean much.

Q. To your knowledge, was that the first instance in this business when any shipper sent flowers by air carrier from this area?

A. A full planeload, yes.

Q. Did you thereafter commence shipment of your products by air carrier?

A. I was employed at that time with another company, but [823] when I, myself, started to ship, we started shipping by air.

Q. What year was that?

A. That I started to ship?

Q. Yes.

A. I believe the first of the year 1947.

Q. Between that time and the organization of Bay Area, of which you were a charter member, how did you transport your shipments by air carrier?

A. Practically all myself, straight shipments through the carriers.

Q. You handled and operated your own equipment?

A. We would hire, sometimes, truckers to pick up our boxes and take them to the airlines, and sometimes we would haul them ourselves.

Q. For that, would you pay truck delivery or pick-up charge? A. That is right.

Q. And these were all straight shipments, you

(Testimony of Alfred G. Enoch.)

say, or, rather, straight sales of prepaid shipments?

A. These were consignment shipments.

Q. Consignment shipments, but direct?

A. But direct. There could have been a few that went airborne, a very small per cent.

Q. Just prior and for a reasonable time prior to the inception of Bay Area as an organization, did you have occasion to [824] ship via Airborne at all?

A. Yes, maybe a few boxes.

Q. Are you a member of any other shippers' organization? A. None whatsoever.

Q. In so far as your particular business is concerned, will you state for the record what consideration prompted you to seek membership in an organization such as Bay Area?

A. We were shipping straight bills, one box, two boxes, or whatever it happened to be, and ran into this prepaid distribution that only cost 25 cents a shipment for distribution charges, and so then we started lumping our shipments into any given town for transfer out of there. That way, we were able to get into the higher brackets of weight.

Q. When you say "we"——

A. My company.

Q. Your company? A. Yes.

Q. Did you mean to imply that you might, with another shipper, on your own initiative, group your shipments together?

A. My own personal company would lump the shipments that were going into this one area together, with no other company.

(Testimony of Alfred G. Enoch.)

Q. Are you familiar with the term variously referred to as collect distribution?

A. Yes, I believe so.

Q. Was that practice in vogue at that [825] time?

A. It fluctuated in and out. Some airlines you could ship collect distribution, and some airlines you could ship prepaid distribution.

Q. What was your particular objective in seeking this particular type of service for your shipments? A. To save myself money.

Q. In what respect?

A. On lower costs for transportation.

Q. You said you were a consignment shipper?

A. That is right.

Q. As a consignment shipper, what effect does the cost of transportation have on your ability to do business or compete in the eastern markets?

A. It is the only way we can compete.

Q. Can you give us some exemplification of that statement so far as the transportation costs compared with the merchandise is concerned?

A. Yes. Only just in the past month the transportation costs, even in consolidation, would run three-fifths of the total selling price of the flowers.

Q. Is that on a per box basis?

A. No. Yes, on the per box basis for the freight.

Q. In other words, your present experience is to the effect that three-fifths of the cost of the merchandise is equal to the transportation costs; is that right? [826]

(Testimony of Alfred G. Enoch.)

A. At certain given times. It will fluctuate from one-tenth up as high as three-fifths, and, once in a while, higher than that. It is very seasonal. Early in the season the flowers sell high, so the freight cost is a smaller percentage, and, as the season progresses and the flowers become cheaper and cheaper, the freight costs take a higher and higher piece. The flowers go down; the freight cost stays the same all the time.

Q. When you say "seasonal," do seasons occur at different times of the year, say, on the West Coast production as compared with Eastern production areas?

A. In my own particular type of shipping, we have three heavy seasons. They run from, starting in the middle of December, until, usually, the middle of March, and then two of the seasons overlap. The asters start in the end of May, and they run on through until the end of September, and in July the chrysanthemums start in and run on through until December or so.

Q. I would like to get more specific on what you mean by the word "season." Is that the period of time in which your market is made available in the East, or the period when your production is available in the West?

A. When our production is available in the West for those varieties of flowers.

Q. In that respect, from a production standpoint, are the eastern markets at a different time

(Testimony of Alfred G. Enoch.)

schedule in production than [827] the western markets?

A. You mean on the same variety of flowers?

Q. Yes. A. Yes, mostly so.

Q. So the status of the season, the weather conditions from the calendar is of some consideration to you as a flower shipper? A. Oh, yes.

Q. Do you find that your membership in Bay Area as a shippers' co-operative organization facilitates your knowledge and information with respect to that fact?

A. By all means. We have to know what weather conditions are, whether a plane can even land or not.

Q. Whether a market might be available due to weather conditions in the East?

A. That is right, because we all wait and hope for the first freeze in the East every year, because, if it comes early enough, it means that much more business, and, if we don't know it until we hear about it, maybe we are a little late sometimes.

Q. Sudden changes in weather conditions, like a sudden freeze or sudden thaw in the East, would that have any effect on your available market?

A. Oh, yes. Normally, right in the middle of the summer, when it is very hot, business is not as good as it is at other times. [828]

Q. Do weather conditions have any effect upon the classification or standardization of your products? A. Yes, I believe it does.

(Testimony of Alfred G. Enoch.)

Q. More favorable weather conditions or unfavorable weather conditions or——

A. Weather conditions will affect the amount we can get in a box. The more we can get in a box without them burning up in a little cooler weather, that is money in a consignment shipper's pocket.

Q. In your experience, have weather conditions in the destination territory in the East required any changes in transit of your particular shipments, or any of your shipments? A. Yes, they have.

Q. Will you describe under what circumstances?

A. Last year, in February, they had quite an ice and sleet storm through the Cleveland area, Detroit and through there, and it was just for valentine shipping, and we had shipped some out, but we had to reroute them all because the plane couldn't even get in.

Q. And is a facility of which you are a member, such as Bay Area, of prime importance in that consideration?

A. That is one of the important things.

Q. How is your personal attention or knowledge as to the destination or location of your shipments affected in that respect?

A. You mean in the way of tracing them, and things like [829] that?

Q. Yes.

A. That is done exclusively by Bay Area.

Q. By which particular person, if you know?

A. Mr. Barulich.

Q. As executive secretary?

(Testimony of Alfred G. Enoch.)

A. That is right, as executive secretary.

Q. Can you describe briefly for the record the manner in which flowers are prepared for shipment in your place of business?

A. You want to start from the time that we buy them or order them?

Q. Take it right from the beginning.

A. We compile our next day's orders, by telephone, and contact our different fields and order how many flowers we want. And a few we pick up. Mostly we have them delivered. And, since we handle several varieties of flowers and have a very small place of business, if we had them all in there at once we couldn't get in, so we have certain varieties of flowers delivered early in the morning and other varieties come in at ten or eleven, and other ones right after lunch, and we run ours on more of a production line method: like asters, we will pack our complete shipments out, which may be thirty, forty, fifty, sixty boxes of asters. And, depending on weather conditions, we have different sizes of boxes, so if it isn't too hot we use one [830] size box that we can put a thousand asters in, but if weather conditions are hot, and so on and so forth, we use a little smaller box and put in five hundred to six hundred asters.

Q. You are referring to weather conditions in destination territory?

A. Weather conditions back East.

And then, after our packing is all finished, we take our manifests that we have from Bay Area and

(Testimony of Alfred G. Enoch.)

insert the names of the companies and the designated town or break bulk point, because we, ourselves, know through the years which towns we should send to for other towns, and usually we take ours in our own truck to the airport.

Q. I show you some photographs of packing of flowers and ask you if they correctly demonstrate or portray some of the methods of packing flowers for shipment by air carrier.

A. Yes, I would say so.

Mr. Gaudio: We offer these as Respondent's next exhibit in order, as one exhibit for the sake of brevity. Is that the Examiner's preference on that, or would you rather that they be numbered separately? This would be 11.

Examiner Walsh: That will be Exhibit 11-A, B, C, D, E, and F, marked for identification.

Mr. Gaudio: We offer them as Respondent's Exhibit 11.

Examiner Walsh: Any objection?

Mr. Stowell: No objection. [831]

Mr. Wolf: No objection.

Examiner Walsh: Hearing none, they are received.

(The documents above referred to were marked for identification as Bay Area's Exhibit No. 11, and were received in evidence.)

Q. (By Mr. Gaudio): Is it, perchance, this one photograph showing a United Airlines' stewardess amidst a number of boxes of daffodils, the particular United Airlines' plane that you referred to?

(Testimony of Alfred G. Enoch.)

A. No, it was long before that.

Q. Of what type of construction is the large container in which boxes, or other boxes containing flowers are inserted? A. You mean——

Q. I had better state it this way. We have been speaking of so many boxes of flowers per shipment. Of what type construction is the box?

A. For many years, the standard box was usually five foot long, twenty inches wide, and could be eight, nine, ten or eleven or twelve inches high. And then there were quite a few four foot boxes with the same width and depth dimensions, and also three foot boxes. Those are more or less the standard shipping boxes.

Q. And what are they constructed of? What material?

A. Cardboard. They come flat, knocked down, and they are folded together and stapled. Most of them are with the lid and bottom two separate pieces. I believe most of the shippers use a box that will stand 250 pounds weight, normally. That is close [832] to average, I would say.

Q. Does this box, made of cardboard, as you described, have any interior frame construction, or is it just cardboard itself?

A. Just the cardboard itself. There could be some special boxes used with interiors, but we personally do not use any.

Q. Do you purchase these boxes yourself? Is that one of your costs of operation?

(Testimony of Alfred G. Enoch.)

A. That is right.

Q. And it goes into the cost of the merchandise at destination territory?

A. That is right, and the cost depends on the amount you buy.

Q. Does your membership in Bay Area facilitate your purchase of boxes for shipping?

A. I believe that was one of the original things in our bylaws, that when we once were in operation we would go into buying of packing supplies, and such things as that.

Q. Unit buying, in other words, for the members?

A. That is right, wooden cleats, rope and such things as that.

Q. You mentioned some of the purposes of your particular interest in being a member of Bay Area. Can you describe other interests that you have as a shipper and marketer of flowers that are given particular attention by your association, as a [833] member of Bay Area?

A. Yes. One of our troubles, when we were shipping on our own, is that certain times of the year there are space problems, and, for an individual shipper, it gets a little bit hard sometimes to get space when your seasons fluctuate up and down, and you almost have to go to every extreme to get space on the boxes.

I, myself, called the president of American Air Lines at a cocktail party one Saturday night in New York, but I got space on the airplane; but, you

(Testimony of Alfred G. Enoch.)

can't go all the way all the time, so, with a man to take care of it for me now, it has relieved my duties.

Q. Which man are you referring to at this time?

A. The salesman for American Air Lines told me I called Mr. Smith, and was very unhappy about it. That has been four years ago, and I don't remember whether that was who I called, for sure.

Q. Do you find that Mr. Barulich's performance of duties as Executive Secretary satisfies that problem as well?

A. It took almost an hour or more of my time away from me every day, that I do not have to use any more, that I can use on my business.

Q. As a marketer, do you consider flowers a perishable item, Mr. Enoch?

A. Yes, sir, very much so. [834]

Q. Mr. Enoch, you are both a member and director of Consolidated Flower Shipments, Inc.—Bay Area. You have attended numerous meetings of the Board of Directors, have you?

A. Yes, I have.

Q. Have you had, at these meetings, occasion to discuss the various problems that you have mentioned here?

A. Yes. We used to discuss them in our regular meetings until we were into this hearing, and since then we have had no time for it, for other things like that.

Q. As a member and as a shipper, in so far as policy is concerned, do you follow the directions of the Board of Directors and the officers of Bay Area?

(Testimony of Alfred G. Enoch.)

A. Yes, I do.

Q. On these consignment sales, do you share or bear the cost of transportation?

A. I bear all the cost of the transportation.

Q. That is handled on an accounting between you and your purchaser on the cost of the merchandise less 20 per cent commission; is that right?

A. Well, I wouldn't use the term "purchaser." I would say "orderer." And the figure can fluctuate between 15 and 25 per cent.

Q. I see. Is that commission applied only to the cost of flowers, not including the transportation?

A. The commission is taken from the total selling price of [835] the flowers, with freight deducted later.

Q. Supposing a shipment is lost, destroyed or damaged in transit. What do you do?

A. We have a form that we fill out and attach our documents, like a copy of our invoice, and what our consignee has told us the selling price is to the eastern markets at that time, and we give it to Bay Area. Mr. Barulich, as Executive Secretary, processes it for us. And he does his utmost to collect those claims. And, if he does, he takes ten per cent. If he doesn't I only have one alternative. I can start trying to collect it, but otherwise I don't get anything.

Q. It is your loss? A. It is my loss.

Q. Do you look to Bay Area as a corporation as such to reimburse you or save you from any such loss? A. No, I don't.

(Testimony of Alfred G. Enoch.)

Q. Have you sustained any such losses in the past? A. You mean the loss of flowers?

Q. Yes, that have been a complete loss to you out of pocket, without recourse? A. Oh, yes.

Q. Is that basis of operation and handling of your shipments without recourse in the absence of any responsibility of underlying carriers, direct carriers, in the circumstances, acceptable to you as a shipper? [836] A. Yes.

Q. I take it your answer to that question implies your continued membership in an organization such as Bay Area; is that correct?

A. That is right.

Mr. Gaudio: You may cross-examine.

Examiner Walsh: Cross-examination, Mr. Wolf?

Mr. Wolf: Thank you.

Cross-Examination

By Mr. Wolf:

Q. Mr. Enoch, you mentioned something about getting reports on the weather; is that correct?

A. That is correct.

Q. Do you get it through Bay Area by teletype?

A. No, sir.

Q. Why?

A. I get it from Mr. Barulich, executive secretary.

Q. Does Bay Area have its own teletype system?

A. They get the weather reports. I can't give you the exact name of it, but it is a U. S. Government Weather Bureau report.

(Testimony of Alfred G. Enoch.)

Q. I see. They get it through the airlines?

A. I can't tell you where it is procured.

Q. Do you know whether or not Airborne has its own teletype system? [837]

A. No, I don't know.

Q. Coming to the question of insurance, supposing your flowers are damaged while they are in flight on a carrier. Do you cover them at all with insurance? Is there any insurance that you have in effect? A. As of now?

Q. In your ordinary course of business.

A. No, I do not carry insurance on my flowers.

Q. Let me give you a specific example. Supposing you send a shipment out through Bay Area, and you want that shipment to go to St. Louis, and, instead, the shipment is sent to, say, Seattle. There is nobody there to receive it, and the flowers are gone. Supposing Bay Area has made out the shipping instructions, and you have lost your flower shipment. The air line, let us assume, has performed its duties of carriage. Would you then endeavor to hold Bay Area responsible for that loss?

A. Do you mean to say that Bay Area made out the shipping bill incorrectly?

Q. Yes.

A. No, because I made out my own manifest.

Q. Assume that Bay Area made out the manifest.

A. They can't. They have no idea what I am shipping, and where, until I give them the manifest.

Q. I see. Supposing the manifest bears the cor-

(Testimony of Alfred G. Enoch.)

rect destination, and Bay Area makes out the next document in order, the [838] air bill, let us say, and puts down the wrong city, as in the example I have given you, and the flowers go to the wrong city, through Bay Area's fault. Would you then hold Bay Area liable?

A. I don't see how it is possible, because the manifest goes with the air bill.

Q. I understand that, but let us assume that this occasion arises——

Examiner Walsh: Presuming that an error was made, Mr. Enoch, and that it was Bay Area's error.

The Witness: I can't see how they could make the error when I have already put it on there and my bill goes with it.

Examiner Walsh: That is not the question. The answer we want from you is, if the error is one committed by Bay Area, what has been your experience in the past, what is your understanding? Is Bay Area liable?

The Witness: If Bay Area makes an error, I have no recourse.

Q. (By Mr. Wolf): If Bay Area makes an error, you have no recourse?

A. No. The Articles and Bylaws state that, sir.

Mr. Wolf: They will speak for themselves.

Thank you, Mr. Enoch.

Mr. Stowell: No questions.

Redirect Examination

By Mr. Gaudio: [839]

Q. On that point, Mr. Enoch, regardless of what

(Testimony of Alfred G. Enoch.)

is contained in the Bylaws, if that should ever occur, and if it has occurred, have you or would you look to Bay area to reimburse you for your loss?

A. No.

Q. Would you expect Bay Area to reimburse you, under the circumstances, for your loss?

A. No.

Q. In those circumstances, do you consider Mr. Barulich, if he handled the documents, to have acted as your agent in your behalf?

A. No, he is not responsible for them.

Mr. Gaudio: That is all.

Mr. Wolf: No further questions.

Examiner Walsh: If there are no further questions of Mr. Enoch, you are excused. Thank you.

Mr. Gaudio: I am sorry. Can I ask Mr. Enoch another question at this point?

Mr. Wolf: Yes.

Q. (By Mr. Gaudio): Are you a member, Mr. Enoch, of this organization known as Northern California Consolidators?

A. I have only heard of it from rumor.

Q. You are not a member?

A. I am not a member. [840]

Examiner Walsh: Is there any cross-examination on that question?

Mr. Wolf: No.

(Witness excused.)

Mr. Gaudio: I will call Mr. Bonaccorsi.

Whereupon:

JAMES F. BONACCORSI

was recalled as a witness for and on behalf of Bay Area, and, having been previously sworn, was examined and testified further as follows:

Direct Examination

By Mr. Gaudio:

Q. What is your occupation and address, Mr. Bonaccorsi?

A. My occupation is a wholesale florist and flower grower. The address is 430 Natoma Street. That is our main office and shipping department.

Q. Did you give the name?

A. Golden Gate Wholesale Florist, Inc.

Q. Incidentally, that name has been mentioned in this proceeding recently, and I would like to ask you at this time, before we go into any other examination, is your firm a member of an organization known as Northern California Consolidators?

A. No, it is not a member of such an organization.

Q. Have you ever participated in any discussions in connection with that organization with anyone? [841]

A. Yes. I was a member of Northern California Flower Shippers' Association, which sponsored the Northern California Flower Consolidators, and, being a member of the Shippers' organization, which is primarily a credit organization, decided

(Testimony of James F. Bonaccorsi.)

that in sponsoring this organization that it would go out and seek other members under this name of Northern California Consolidators' Association.

Mr. Wolf: Pardon me. For the record, could we get the correct corporate title? Is it Northern California Flower Consolidators?

The Witness: There are two associations; Northern California Flower Shippers' Association is an association that has been in existence for, I presume, eleven or twelve years. Northern California Flower Consolidators, Inc., is supposed to be a new organization.

My part in that organization, as I was just saying, is that I attended all the pre-gathering of the members, attempting to form this new association. We paid $40 to Mr. Bowdish. When I say "we," I mean the company—for his services in forming this organization. To my knowledge, this organization is not in existence.

Q. (By Mr. Gaudio): At least, you have never received any notice of any activity, such as meetings of the members, where the offices might be situated, Board of Directors' meetings, who the officers [842] are, or anything else?

A. No; only as I said before, while it was being formed I attended meetings.

Q. Are you aware of the person's identity who was first nominated or elected to the office of President of that group? A. Yes.

Q. Who was that? A. Mr. Zappettini.

Q. Mr. William Zappettini, who is one of the

(Testimony of James F. Bonaccorsi.)

Respondents in this proceeding?

A. Yes, that is correct.

Q. Were you with him at the meeting at which he was nominated as such?

A. Yes, nominated and elected, I presume.

Q. Did you have any discussions with Mr. Zappettini after that occasion?

A. Yes, on our way home we discussed that situation.

Q. And what was your and his discussion, that is, so far as your intentions in that connection at that time?

A. Intentions in what way, do you mean?

Q. With respect to membership or activity in this Northern California group.

A. How I felt about it?

Q. What was your discussion with him as to how you and he felt about it? [843]

A. The discussions, of course, were general. I believe, of course, Mr. Zappettini can speak for himself, but the conversation was more or less it appeared that he was really—well, I don't know just what word to use—to keep him in the organization, I should say, they nominated and elected him President, and it was very obvious, at least to us who knew him, that he told me that night that he was going to resign the very next day, which I understand he did, as an officer and acting any part in this proposed association.

Q. Have you ever directed, in so many words, or by the execution of any document, the transmis-

(Testimony of James F. Bonaccorsi.)

sion of any of your flower shipments through this facility known as Northern California Consolidators?

A. To my experience, we did ship through what was supposed to be the Northern California Flower Consolidators. As I said before, it was being formed. Some of the flowers of Golden Gate were put in this consolidation, I presume, but, of course, I am not sure.

Q. I see. Since your conclusion that the organization was not functioning, have you routed any shipments via that facility?

A. To my knowledge, I have never used such a manifest, either. I only used Airborne's manifest during that time that this organization was being formed.

Q. I see. What is the status of your shipments? Are they consignment or straight sales or [844] both? A. They are both.

Q. Have you any way of approximating the percentages one against the other?

A. Yes. We were requested by the Executive Secretary for information that was needed for the records, as to our fiscal year, last year, I should say, and our consignment business was approximately 53 per cent.

Q. You have heard the testimony, I presume, of previous member witnesses of Bay Area that were consignment shippers. Is your basis with your consignees the same?

A. Yes, they are the same.

(Testimony of James F. Bonaccorsi.)

Q. That is, insofar as transportation charges are concerned? A. Yes.

Q. Are you presently a member in good standing of Bay Area? A. Yes.

Q. And an officer or director?

A. A director.

Q. You have paid your dues and assessments as prescribed by the Board of Directors, have you?

A. Yes, I have.

Q. You heard the testimony of Mr. Enoch just given, insofar as the origin and scope of Bay Area and the services afforded to him as a shipper, insofar as marketing flowers in destination [845] territory in the East is concerned?

A. Yes, I have.

Q. Do you subscribe to that testimony insofar as your product is concerned? A. Yes.

Q. In your individual position, have you anything further to add to the testimony as given with particular thought to the straight sales shipments?

A. Well, the primary interest in this Bay Area is it serves more than one purpose. As a grower, we are primarily concerned in marketing our flowers throughout the United States, and have them arrive at the lowest possible cost, so that we can get a fair return for our products and our efforts in growing the flowers. If the rates are high and the flowers don't bring the price that is necessary for us to continue growing, we must then quit growing them, because we can't afford to ship them. That

(Testimony of James F. Bonaccorsi.)

is, the cost of transportation in many cases has been greater, or approximately as high as the cost of flowers that we shipped, and that is a very primary factor in our industry. It is obvious that that naturally would limit the sales of growers in this area.

Q. Take those straight sales shipments, for example, and let us assume a situation such as Mr. Wolf has suggested, that in handling such a shipment, through some clerical error by the Executive Secretary of Bay Area, or any Bay Area personnel, that [846] shipment is lost or destroyed, never received by your consignee. What do you do?

A. There is not much we can do. The responsibility is mine, in other words. We can't go to Bay Area or to Mr. Barulich or the consignee for reimbursement of that shipment.

Q. You consider it your own loss, uncompensable so far as Bay Area is concerned?

A. That is correct.

Q. Have you sustained any such losses in the past? A. I should say so.

Q. Have you ever had an opportunity or taken the time to compare the differential that might exist in the cost of transportation to you as a consignment shipper per box prior to Bay Area or using any other facilities than Bay Area's and as compared with the cost of the box, using your facilities available through Bay Area?

Mr. Wolf: Mr. Examiner, the usual objection;

(Testimony of James F. Bonaccorsi.)

unless related in point of time, the comparison doesn't mean much.

Examiner Walsh: Can you indicate a common period?

Mr. Gaudio: Yes.

Q. (By Mr. Gaudio): Let us take a representative period, Mr. Bonaccorsi, prior to your membership in Bay Area, according to your then experience, and your experience subsequent to your participation in the Bay Area program. [847]

A. The comparison between the shipments that were made prior to our being a member of Bay Area and during—right after becoming a member of Bay Area; is that your question?

Q. Yes.

A. Well, we definitely have effected savings, to the amount of at least from $1.50 to $2.00 per box, and, at that particular time, I would like to add, we made a thorough check to make sure that we were doing what was right, and so forth, that we were on the right track.

Q. Does that amount of margin in the cost of transportation determine or have any determining factor in showing a profit and loss on that particular consigned sale?

A. In many cases, that is the profit.

Q. Per box? A. Correct.

Q. Can you tell us how many boxes you might ship in a given period of time? Have you ever made a survey to determine how many boxes you have shipped in the last fiscal year?

(Testimony of James F. Bonaccorsi.)

A. No, I have not made any survey as to how many boxes I have shipped.

Q. Would you say it is a substantial sum?

A. I would say so, yes.

Q. How often do you ship by air?

A. I would say that we ship by air in some volume or other every day except Sunday. [848]

Q. Can you approximate the average number of boxes per shipment?

A. I might put it this way: Being a grower, our volume fluctuates according to our crops. We have more or less a steady flow every day, but when we come in with a crop, a certain flower at a certain season, our volume increases. I would say that we have had days when shipments ran in excess of 100 boxes.

Q. That might mean a difference of $150 to you in one day? A. That is correct.

Q. As a grower of flowers, are you particularly interested in the available production of flowers by growers in the eastern markets?

A. Flowers from the East coming to San Francisco?

Q. No, flowers, from eastern markets, serving your destination territory.

A. I am sorry. I don't quite get your question.

Q. As a grower of flowers, are you particularly interested in the condition of the growers' markets in the East? A. Of course.

Q. You compete directly with them, do you?

A. At some times of the year, yes.

(Testimony of James F. Bonaccorsi.)

Q. Depending on the nature of the crop?

A. That is correct, the type of flower. [849]

Q. You heard from Mr. Nuckton's testimony regarding the available market conditions in the East as affected by weather conditions, did you not?

A. That is true.

Q. And you have found, from your experience, that to be a potent factor regarding your shipments via Bay Area? A. Definitely so.

Q. Will you state what single factor, apart from the question of cost, you, as a shipper-grower, find of particular benefit to you as a member of Bay Area?

A. It is more than just one phase of this membership here. I mean, we are at present enjoying consolidation rates as a grower. We have this information as to weather conditions throughout the country, and we have the handling of the claims through our Executive Secretary's office and Executive Secretary. We hope, in the near future, as time permits, to increase the benefits for the members, as was mentioned previously by Mr. Enoch, I believe.

Q. In other words, the organization of Bay Area, its primary mission, is something more than merely handling flowers for shipment by air carrier? A. Definitely.

Q. As a member, do you subscribe to the directives of the officers as may be resolved by the Board of Directors of Bay Area, and abide by their rulings and considerations? [850] A. I do.

Q. As a grower, Mr. Bonaccorsi, have you ever

(Testimony of James F. Bonaccorsi.)

made any inquiry into the subject of crop protection engineering? Does that mean anything to you?

A. Well, it means a lot to us, and to the members. We are at present engaged, and have for the past, I should say, two months, practically, engaged in what we call crop protection engineering.

Q. And, generally speaking, how does that serve you as a grower?

A. Naturally, as a grower, it would help to prevent freezing of crops during a period of the year when this area is susceptible to the weather elements.

Q. In other words, that is with particular reference to a problem in this area?

A. That is correct. It is actually, I might add, the first step in that direction in this area.

Q. Are you a member of Northern California Shippers' Association?

A. I am no longer a member.

Q. Were you a member? A. Yes, I was.

Q. How many members do you know, or, at least, how many members are there in that association, to the best of your knowledge and belief? [851]

A. When I left the Northern California Flower Shippers' Association, there were nine members.

Q. How many? A. Nine.

Q. Are there other flower growers or shippers' organizations than have already been mentioned in this hearing? Are there others?

A. Other associations?

(Testimony of James F. Bonaccorsi.)

Q. Yes. A. Of course, a number of them.

Q. And their membership consists of either nurseries, wholesalers of flowers, retailers of flowers?

A. That is right.

Q. From your experience, are all such industries or individuals, businesses, prospective shippers of air freight?

A. Are they all prospective shippers? Of course; anyone that grows flowers is a prospective shipper of air freight.

Q. Prior to the advent and the use by you of air carrier service for flowers, did you have a market in the East? A. For the flowers we grew?

Q. Yes. A. Well, yes, but it was limited.

Q. How did it move at that time?

A. Most of it by rail.

Q. By specialized cars? [852]

A. Railway reefer cars.

Examiner Walsh: Reefer?

The Witness: Reefer, or refrigerator, I should say, but the term they use is "reefer."

A. (By Mr. Gaudio): In your opinion, with respect to these other members or shippers or nurseries, do you know whether they ship by rail at the present time?

A. I believe a number of them still do.

Q. So that there are other shippers in this area of flowers which are, to your knowledge, not members of Bay Area; is that correct?

Item 1.

A. That is correct.

(Testimony of James F. Bonaccorsi.)

Q. Nor, as far as you can recall, have any activity in Northern California Flower Shippers' Association; is that correct?

Item 2.

A. That is correct.

Q. Or in Northern California Consolidators; is that correct?

Item 3.

A. That is correct.

Mr. Wolf: Mr. Examiner, there was no testimony as to the last named. [853]

Mr. Gaudio: I will withdraw that. I am sorry.

Mr. Wolf: The names are mixed up.

Q. (By Mr. Gaudio): And all of them are prospective shippers by any available shipper that might be out of this as origin territory?

A. That is correct.

Q. So, as a member and director of Bay Area of some twenty-five members in this area, do you consider that to be any substantial portion of the available shippers in this area?

A. No, a very small portion, I would say.

Q. Did you ever have any conversations with Mr. McPherson, the Complainant here, regarding his proffer of service during that period when Bay Area was non-existent, that is, was not actually functioning?

A. I think you will have to rephrase that question.

Q. Have you ever had any conversation with Mr.

(Testimony of James F. Bonaccorsi.)

McPherson regarding what he might offer you as a shipper in handling your flowers?

A. What he would offer me as a shipper of flowers?

Q. Yes; what type of service, or what particular benefits might be offered you?

Examiner Walsh: I think he indicated in his original examination, during the period when Mr. Reynolds had withdrawn his service. Is that correct?

Mr. Gaudio: That is right. [854]

The Witness: All I know is that California Flower Consolidators, which is a subsidiary of Airborne—that is what was offered to me while this association was being formed, this California Flower Consolidators.

Q. (By Mr. Gaudio): Did he make any indication to you at that time as to whether you would be limited in any respect regarding the shipments to be handled by them?

A. No. At that time, I believe at one of the meetings, the entire volume of flowers from the members would be consolidated, and that the consignee would receive the consolidated rate.

Q. And as to individual component parts of that shipment on the consolidated basis, what particular benefit would they share?

A. Well, I didn't know that until the very last meeting. In fact, two meetings, the one that was held in Airborne's offices, I questioned a single lot shipment to a three lot shipment. I then discovered

(Testimony of James F. Bonaccorsi.)

that a single lot shipment was penalized because it was under 100 pounds, I believe two cents per pound.

Q. You mean that a different statement had been made to you before?

A. Let us say I had been led to believe that the consignees, whether it was one box, five boxes or ten boxes, would get the consolidated rate. [855]

Q. Would get the benefit of the consolidated rate for his component part of the shipment?

A. Correct, whether the component part might be one or two boxes.

Q. And, with that understanding, you went to the meetings and learned that it was not so; is that correct?

A. Yes. As I said, the last meeting that I attended.

Q. Did you mention Mr. McPherson's mentioning anything to you about joint loading?

A. No. That came up at another meeting. I think this was held at United Airlines Conference Room. That was prior to this one we are just discussing. In fact, that is the meeting that Mr. Zappettini left that night and he wanted to resign.

I directed a question to Mr. McPherson, if he would allow the members of this association—if it were joint loaded with McLellan's flowers, which we knew there was such an arrangement—would the members get the same consolidated rate as McLellan would?

Q. What was his reply?

A. His reply was "No" at that meeting.

(Testimony of James F. Bonaccorsi.)

Q. And when you say the members of the association, are you referring to the association that was then contemplated to be formed?

A. Being formed, that is correct.

Q. Is Mr. McLellan, whoever he might be, [856] a competitor of yours?

Mr. Wolf: Mr. Examiner, I don't know anything about Mr. McLellan, or whether he is a competitor of Mr. Bonaccorsi's, but if this examination is in any way endeavoring to show any tariff violations on the part of Airborne, I will continue to object to these various questions. I see no purpose in this examination so far as the issues in this case are concerned.

Mr. Gaudio: Mr. McPherson and Mr. Wolf have tried to develop here that my people have become in some way complicated with a fictitious organization—certainly fictitious on Mr. McPherson's own statement, when he says that though the letterhead was "California Consolidators," it wasn't in fact incorporated, with the documents so labeled in the hands of many people. That is certainly misleading, if nothing more. Why he has injected that into this record, I don't know; or why he has injected the association of my people with that organization into this record, I don't know; but, I think we are entitled to explain how it came about, on whose representations, and whether those representations were sincere or not.

Mr. Wolfe: At this time, Mr. Examiner, we are talking about a Mr. McLellan, whose name for the

(Testimony of James F. Bonaccorsi.)

first time appears in this record for any particular purpose. What he has to do with why these people became associated or disassociated with Northern California Flower Consolidators, I don't know.

The Witness: Can I—— [857]

Mr. Wolfe: Just a minute. I have an objection.

Examiner Walsh: I will allow the witness to answer.

The Witness: In answer to your question——

Mr. Wolfe: I haven't asked a question.

The Witness: Then I will ask this question. In answer to Mr. Wolfe's question, which I direct to you, it has a vital importance in this industry, the floral industry—vital.

Examiner Walsh: I will let your Counsel take care of that, Mr. Bonaccorsi.

Q. (By Mr. Gaudio): In other words, Mr. Bonaccorsi, it was of particular importance to you to know whether or not you, as a smaller shipper, would be afforded the same rates and privileges which this man McLellan that you refer to was receiving, according to your knowledge?

A. Of course. I could see that if this volume of this proposed group, or this group that was functioning, if their volume of flowers was added and joint loaded with McLellan, a large shipper, he would land his flowers at a cheaper rate at the expense of the association members. The flowers would be landed cheaper, and he would have the advantage over all of us; and, for that reason alone, I objected. He would have an advantage over us.

(Testimony of James F. Bonaccorsi.)

Q. The joint loading of your composite shipments with his would, in effect, give him an overwrite on the sale of the [858] merchandise?

A. Correct. As I previously stated, McPherson had said, "Yes, your members will enjoy the same consolidated rate that applies in the consolidation of the joint load rate," and then I could see we all would be equally the same.

Q. Have I developed with you, Mr. Bonaccorsi, the disposition of loss and damage to your flowers on a straight sale? Have you explained that?

A. Have I explained——

Q. The disposition as between you and Bay Area. A. In the event of a loss?

Q. A loss or damage to a straight sale shipment.

A. I think we covered that.

Q. I know I did on a consignment basis.

A. And not on straight. On the straight shipments, the same applies as on consignment.

Mr. Gaudio: I think you may cross-examine.

Mr. Wolfe: Thank you.

Cross-Examination

By Mr. Wolf:

Q. Mr. Bonaccorsi, coming back to these meetings of Northern California Consolidators, you testified that you remember a first meeting where Mr. Zappettini was elected President. You remember that? A. That is correct. [859]

Q. Now, you have also testified, I think, that you

(Testimony of James F. Bonaccorsi.)

remembered a second meeting at the United Airlines Conference Room? A. That is correct.

Q. How many people were there? How many florists were there?

A. At the conference room?

Q. At the United Airlines Conference Room.

A. That is the first one, then.

Q. Whichever one it was.

A. Well, I would take a guess of twenty-five or so, somewhere in that neighborhood.

Q. Do you remember the date?

A. No, I don't.

Q. Would you say that July 12, 1950, was too far off?

A. I couldn't say one way or another.

Q. Do you recall that a contract was entered into between Northern California Flower Consolidators, Inc., and California Consolidators, a division of Airborne?

A. I know that a contract was tendered by Airborne Company, that is correct, subject to the approval of the members.

Q. You don't know whether that was executed?

A. No, I didn't even know that the company was in existence. I know that we were being formed, as I previously testified. [860]

Q. But you knew that you had a president, didn't you, Mr. Bonaccorsi?

A. President, yes, but that doesn't mean that we had a company. To my knowledge, we never had a

(Testimony of James F. Bonaccorsi.)

company. You can elect officers before you have your company.

Q. How about the directors?

A. I think I got into that, too. I think they were trying to get me on that. I believe I was a director. Yes, now that you ask that question, that is true.

Q. That is what I thought.

A. But that is all.

Mr. Gaudio: Is that all, Mr. Wolf?

Mr. Wolf: No, he said that is all. I didn't say that.

Mr. Gaudio: I am sorry.

Q. (By Mr. Wolf): You testified you have resigned from Northern California Consolidators, Inc.? A. No, I never resigned.

Q. You haven't resigned? A. No.

Q. Are you still a member? If you haven't resigned, you are still a member; is that correct?

A. How can I be a member of something that never existed?

Mr. Gaudio: He is arguing with the witness. He has denied that there ever was an association. [861]

Mr. Wolfe: He has never resigned.

Mr. Gaudio: He never had to resign.

Examiner Walsh: Let's proceed, Gentlemen, and I suggest you conduct the examination in a less argumentative fashion, Mr. Wolf.

Mr. Wolf: Very well, Mr. Examiner.

Examiner Walsh: Did you have something to say, Mr. Gaudio?

Mr. Gaudio: Only when Mr. Wolf is through.

(Testimony of James F. Bonaccorsi.)

Examiner Walsh: You can state what your impression is of the corporation, whether it is in existence, whether you are still a member or not, but just give the facts.

Q. (By Mr. Wolf): You have not resigned as a member? A. No, I have not.

Q. You have testified that the number of shippers in the Bay Area who are members of the Bay Area organization is a very small portion of the total flower shippers in this area?

A. That is correct, in my opinion.

Q. How many flower shippers are there in the area?

A. Well, I have never taken an actual count of how many there are, but there are all types of shippers. I mean, there are pot-plant shippers, fern grower shippers, cut flower shippers, growers that grow certain flowers that are shipped during their seasons. I would say 100 or more in this area, or maybe even 150. I don't say they ship all year around, but they are [862] shippers.

Q. Mr. Bonaccorsi, as a matter of fact, don't you know that there are about seventy or seventy-five shippers of flowers in this area?

Mr. Gaudio: By all forms of transportation, via all services?

Mr. Wolf: All services.

The Witness: That is news to me.

May I correct something here? I made a statement that I did not resign as a member. After thinking about it, I was never a member, because

(Testimony of James F. Bonaccorsi.)

I never paid any dues. I had never been billed for anything, so how could I resign from something I didn't belong to?

Examiner Walsh: Suppose you make a statement to that effect.

Mr. Gaudio: Do you wish to explain your former answer to one of Mr. Wolf's questions regarding your present membership or status in this Northern California Flower Consolidators?

The Witness: Yes.

Mr. Gaudio: What is that?

The Witness: I could not resign. I never paid any dues to the association. I never was billed for anything; so, therefore, in my own mind, I never belonged, and since I never belonged I could not resign.

Mr. Gaudio: You have never found any need, in your [863] understanding of the situation, to tender any resignation?

The Witness: Evidently not.

Examiner Walsh: I think that is sufficiently clear now. I don't want to interrupt Mr. Wolf's cross-examination too much.

Proceed, Mr. Wolf.

Q. (By Mr. Wolf): Have you ever resigned as a director? A. No.

Q. So far as you know, you are still a director?

A. As far as I know, yes.

Q. You ship flowers daily, don't you, Mr. Bonaccorsi? A. Except Sundays and holidays.

(Testimony of James F. Bonaccorsi.)

Q. As a matter of fact, don't you ship by Airborne almost daily?

A. I will say that Airborne receives one or more boxes at some time or other during the week, yes.

Q. I see. When you say some time or other, how many of these days during the week?

A. There are days that Airborne doesn't get any, and there are days when Airborne may get six or seven, and some days one or two.

Q. I see. Do you know if those shipments are consolidated?

A. As far as I am concerned, they are not consolidated.

Q. You don't know?

A. As far as I know, they are forwarded on Airborne's [864] tariff. I have received nothing to show that they have been consolidated or are consolidated.

Q. I see. Have you ever looked at the tariff rates and compared them with the consolidated tariff rates to make sure?

A. Any particular time?

Q. Last night, say. A. No, I did not.

Q. As a matter of fact, don't you know that your flowers, in many instances, go out on a consolidation, that is, on the Northern California Flower Consolidation? A. Why keep it a secret?

Q. I say, do you know that?

A. I say no, why keep it a secret?

Q. You don't know?

A. No, I don't. I am sorry.

(Testimony of James F. Bonaccorsi.)

Q. You have talked about the Bay Area and its services, Mr. Bonaccorsi. You have also described to us the fact that you originally participated with Northern California Flower Consolidators. Your purpose in participating in the second organization was to see if you could ship flowers cheaper, was it not? A. Not necessarily.

Examiner Walsh: Would you explain?

The Witness: Glady. Northern California Flower Shippers Association sponsored—of which I was a member—Northern California Flower Consolidators. As a member, I naturally was [865] invited to attend whatever meetings were held for this new proposed association.

At that particular time, Bay Area did not have agents throughout the country, as it has today, and in some cities Airborne had practically the exclusive service. It appeared to me at that time perhaps I should go along and see that we could ship our flowers through Airborne under this new proposed association, and that would give me a better coverage for my operation of distribution of flowers throughout the United States.

Q. (By Mr. Wolf): Is this a fair question, Mr. Bonaccorsi, that you would join any association of shippers where you could get better rates or better coverage?

A. No, definitely not, not any, no.

Q. You would join pretty nearly any?

A. No.

(Testimony of James F. Bonaccorsi.)

Q. You mentioned something about a differential in rates on one box or three boxes?

A. That is correct.

Q. Do you recall that Mr. McPherson explained that the reason for this change in rates was for the benefit of all the members, and that all the members were present and agreed that the change should be made?

Mr. Gaudio: Just a moment, Mr. Bonaccorsi, before you answer. [866]

If you don't establish a foundation as to which members, considering the various organizations that have been mentioned I object.

Examiner Walsh: I assume he is referring to Northern California Flower Consolidators.

Mr. Wolf: Members of Northern California Flower Consolidators, that is right.

The Witness: Are you referring to the first shipment or the second shipment?

Q. (By Mr. Wolf): Maybe I can bring back your thoughts a little bit. We were talking somewhere along the line about a differential of two cents.

A. Yes, I know what you are talking about now.

Q. Now, that was discussed by Mr. McPherson, and they all agreed?

A. After he had put it in practice, not before.

Q. But it was for the benefit of all the members?

Mr. Gaudio: Do you mean to the prejudice or to the additional cost of all the members, Mr. Wolf?

(Testimony of James F. Bonaccorsi.)

How can an additional assessment redound in a benefit?

Mr. Wolf: Excuse me.

Examiner Walsh: I think the statement he made about those particular charges might require a little more detailed explanation, so that we might have a full understanding with respect to [867] what those charges actually were, the mechanics of it.

Q. (By Mr. Wolf): You mentioned two cents. Could you explain what that was?

A. Well, I objected against it, but, since it had been in operation, my objection would be of no value, so I did not object at the meeting. The two cents was if a one-box shipper sent a shipment, compared to a three-box shipment which weighed 100 pounds or more, it appeared that some of the members, or maybe Mr. McPherson, decided that the one-box shipper should pay a penalty of two cents.

Q. Mr. Bonaccorsi, go ahead and give us a little more explanation of that. I don't understand the mechanics of it.

A. Well, personally, I didn't understand it myself, either. All I know is that I was told that a box, one shipment, would be assessed two cents a pound, or two boxes under a hundred pounds would be assessed two cents per pound of the consolidation rate.

That is what I was told it was going to be at that particular meeting.

Q. Don't you recall, Mr. Bonaccorsi, that actually the two cents was a reduction on the larger

(Testimony of James F. Bonaccorsi.)

shipments, and that there was no increase on the smaller shipments? Now, think a little.

A. This organization that was being formed was to [868] consolidate the flowers and that the consignees were to receive the consolidated rate, whether it be one box, two boxes or ten boxes. I see no bearing. That has no bearing whatsoever.

Mr. Wolf: All right. That is all. Thank you, Mr. Bonaccorsi.

Mr. Stowell: I have some questions.

Examiner Walsh: Mr. Stowell.

Q. (By Mr. Stowell): Mr. Bonaccorsi, it was your testimony that you joined Bay Area in order to secure transportation rates which were lower than what you were paying via existing air indirect or direct carriers? A. That is right.

Q. How did you know what you were paying for your existing transportation air services prior to joining Bay Area?

A. The airlines have a published tariff. That was one which I received. Airborne had his tariffs, which were given to me.

Q. Did you ever examine the Airborne documents at the time to determine what the extent of your payment of air transportation charges was or would be at the time? A. Yes.

Q. What type of documents other than the tariffs did you examine to know what you were actually paying out of pocket for such services? [869]

A. On the consignment shipments, I would receive the returns from the wholesale commission

(Testimony of James F. Bonaccorsi.)

house on the eastern markets. Then, I would know exactly what I had paid.

Q. Any other documents? A. No.

Q. When you joined Bay Area, did you discontinue shipping via Airborne?

A. When I joined Bay Area, 75 per cent, I would say as a guess, of my business was diverted from Airborne to Bay Area.

Q. Have you compared your transportation expense for Bay Area shipments as against similar shipments going to the same points by Airborne?

A. I have. At the beginning of my joining Bay Area, we had many comparisons.

Q. What conclusion did you come to?

A. As I previously stated, earlier in my testimony, $1.50 to $2.00 per box.

Q. You continued shipping via Airborne for how long?

A. Perhaps I should clarify a point. The shipments that are going through Airborne are shipments where most of them require Airborne's service because they want what they refer to as excess valuation. These shipments—the consignees request that.

Q. What proportion of Airborne's shipments would you say are the result of consignees' requests? A. One per cent. [870]

Q. Now, you still continue to ship via Airborne, at the present time?

A. As I stated earlier, yes.

Q. Have you ever compared the reports from

(Testimony of James F. Bonaccorsi.)

consignees, which you just mentioned a moment ago respecting Airborne's shipments, with reports from consignees respecting Bay Area's shipments?

A. The only way I can answer that is that, first, Airborne on consignment shipments has only received shipments where Bay Area did not serve, as I previously stated. There was no need for me to make any comparison at that particular time.

Q. But you undoubtedly have made some comparisons?

A. In the same city; in other words, before I joined Bay Area, and after that transition, that was the time that we actually made a study of it.

Q. Mr. Bonaccorsi, is it your testimony that at the present time when you use the service of Airborne you never forward a shipment via that service into the same point which is served by Air Area?

A. I wouldn't say. There may be some shipments.

Q. There may be occasions when you use Airborne as a carrier to deliver your boxes to a point which Bay Area serves; is that correct?

A. That is possible.

Q. In fact, it is probably very frequent that that happens? [871] A. Not frequently.

Q. Well, it happens on occasion?

A. All right.

Q. Have you ever compared the transportation expense, your out-of-pocket transportation expense, when you examined those consignee reports respect-

(Testimony of James F. Bonaccorsi.)

ing the shipments via Bay Area and those via Airborne going to the same destination?

A. I don't have anything going to the same points.

Q. Mr. Bonaccorsi, you have just told me that on occasion you do ship——

A. But that is a straight shipment, not consignment. You just asked if I shipped, via Airborne, to the same places where I ship via Bay Area. But, when that condition exists, one is a consignment shipment and one is a straight sale. In the outright sale, I never got to know what the consignee pays, only perhaps when there is a claim; that is, maybe, the only time, and there is no need for me to compare.

Q. And your testimony is that you never had occasion to compare your out-of-pocket transportation expenses, as you have noted them, on these consignees' reports for Airborne shipments and Bay Area shipments, even when they don't go to the same cities? You have never had any occasion to compare the amounts for air transportation?

A. You will have to be more specific. I am getting confused here between straight shipments and consignment shipments [872] going via Bay Area, going via Airborne, and so forth.

Q. In joining Bay Area, you were perfectly aware that when you joined Bay Area you received a saving from Bay Area in your out-of-pocket expenses on consignment shipments?

A. Correct.

(Testimony of James F. Bonaccorsi.)

Q. But, however, you stopped making such comparisons as long as you continued using Airborne at the present time, and after your joining Bay Area. Is that the impression you want to leave?

Mr. Gaudio: It has me confused now. I can't follow the question, Mr. Stowell.

Mr. Stowell: Let's start over again.

Examiner Walsh: Let's take a recess.

(Short recess taken.)

Examiner Walsh: Come to order, Gentlemen.

Mr. Stowell: Mr. Examiner, I have decided to conclude my examination of this witness.

Examiner Walsh: Do you have any redirect, Mr. Gaudio?

Mr. Gaudio: I would just like to ask Mr. Bonaccorsi one further question.

Redirect Examination

By Mr. Gaudio:

Q. Mr. Bonaccorsi, do you consider yourself qualified in any way to satisfactorily read tariffs and tariff publications and the like? [873]

A. I do.

Mr. Gaudio: That is all.

Mr. Wolf: May I ask one question, Mr. Examiner?

Examiner Walsh: Yes, Mr. Wolf.

Recross-Examination

By Mr. Wolf:

Q. Mr. Bonaccorsi, will you take a look at Air-

(Testimony of James F. Bonaccorsi.)

borne's Exhibit No. 4, which is the eighth copy batch of airbills. A. I am now looking at it.

Q. Will you take the copy marked No. 7, which is a white copy. On the bottom it says, "Shipper's copy." Do you receive those for your air bill shipments?

A. Lately we have been receiving them.

Q. You have been? A. Lately.

Q. About once a week they are delivered to you, aren't they?

A. When they are delivered I do not know.

Q. There are spaces here setting forth the description of the property, number of pieces, the weight, dimensional weight, air rate, whether it is prepaid or collect, and various other items. Do you ever examine the figures or words that are filled in, if they are filled in?

A. I have commenced examining them this last week, yes.

Q. So, if you do examine them, you could [874] compute from that how much the transportation charge on your shipment is, couldn't you?

A. I could, yes.

Mr. Wolf: That is all. Thank you.

Examiner Walsh: Mr. Gaudio, do you have any further questions?

Further Redirect Examination

By Mr. Gaudio:

Q. Mr. Bonaccorsi, is that shipper's copy, which

(Testimony of James F. Bonaccorsi.)

Mr. Wolf just questioned you on, given you at the time the shipment is tendered by you for delivery or mailed to you at a later date, or what?

A. It is not given to us at the time we tender shipments. We use the other form that was put in here for an exhibit. I don't remember the number.

Q. Have you examined those documents, as you say, within the last week, since you have commenced receiving them, to determine whether all of the charges ultimately assessed to your account, including pick-up, consolidation charges, and delivery charges, are reflected thereon?

A. Yes, on the one that I receive.

Q. Now, before this period when you have been receiving these documents—or have you been receiving these documents in the past?

A. I would like to put it this way. When I first commenced [875] shipping, I requested such documents, and I did not receive them for quite some time, so, therefore, I could not make any comparisons. I also checked with Airborne about them, after I checked in my office, and found, well, we haven't got this one, and we haven't got these, and so forth. My file has been incomplete.

Does that answer your question?

Q. Yes. Have you ever learned that the total charge as indicated on the shipper's copy of Airborne's freight bill is different from the total charge as reported by your purchaser?

A. Whenever I was able to make a comparison,

(Testimony of James F. Bonaccorsi.)

I would say yes. In some instances, yes, I have found it different.

Mr. Gaudio: No further questions.

Examiner Walsh: Mr. Wolf?

Mr. Wolf: One question.

Further Recross-Examination

By Mr. Wolf:

Q. Mr. Bonaccorsi, the difference that you mentioned in charges was when you received your statement from your consignee; is that correct?

A. From the consignee in this case, let's say, yes.

Q. The amounts set forth on these air bills show all charges up to the point of landing at the airport city, do they not?

A. I believe they do, yes; some of them do. [876]

Q. So the difference in charge would be the delivery charge, the local delivery charge from the airport city to the ultimate consignee, wouldn't it?

A. It could be, yes.

Q. One further incidental question. Do you carry insurance on your flowers?

A. At present I don't. The only insurance I carry are the shipments—I should say, not insurance, but excess valuation through Airborne's facilities.

Mr. Wolf: Thank you. No further questions.

Examiner Walsh: You may be excused. Thank you.

(Witness excused.)

Mr. Gaudio: I would like to call Mr. Nuckton.

Whereupon:

JOHN NUCKTON

recalled as a witness for and on behalf of Bay Area, having been previously sworn, was examined and testified further as follows:

Direct Examination

By Mr. Gaudio:

Q. Mr. Nuckton, I believe you already stated that you are presently the President of Consolidated Flower Shipments, Inc.—Bay Area?

A. Yes, sir.

Q. And, as such, do you preside at the meetings of the [877] Board of Directors?

A. That is right.

Q. And have you so presided in the past during your term of office? A. Yes.

Q. And at these meetings of the Board of Directors have various questions of policy and operation of Bay Area in its over-all service to the members been discussed in various phases? A. Yes.

Q. Whatever might be the determination of the Board of Directors, that has been passed on to the members by the Office of the Executive Secretary?

A. That is right.

Q. Has that been pursuant to the direction of the members and the officers of Bay Area?

A. Yes.

Q. You, as an individual member, in other words, then, subscribe to and adopt whatever pro-

(Testimony of John Nuckton.)

cedures and matters of policy are determined by the Board of Directors? A. That is right.

Q. And as a shipper, you abide by that policy?

A. Yes.

Q. Incidentally, you have the John Nuckton Company, an individual proprietorship; is that correct? A. Yes. [878]

Q. This John Nuckton, Inc., of Palo Alto, is that a wholly owned stock ownership?

A. It is. I do business under three different names, for the simple reason that I have a manager in each business who works for part of the profits, and, therefore, I have to keep three different sets of accounts. My shipping business now is John Nuckton, Inc.

Q. John Nuckton, Inc. And that is 100 per cent stock ownership in yourself?

A. 100 per cent.

Q. You have direct control and ownership of the management of that company; is that right?

Q. Have you in the past had occasion to use Airborne's service? A. I have.

Q. During what period of time was that?

A. That was during the period that Bay Area didn't operate for lack of trucking facilities, at the end.

Q. You are referring to the trucking facilities here under Mr. Reynolds? A. Yes.

Q. And for how long a period did that continue?

A. Well, I shipped through Airborne for a matter of only a couple of weeks, because I was off crop

(Testimony of John Nuckton.)

at the time. Most of that period I was off [879] crop.

Q. After the difficulty was removed by the reorganization, as has been discussed here, between the members and the Board of Directors and Mr. Barulich as Executive Secretary, on the one hand, and the Airport Drayage on the other hand, it made the service again available through Bay Area; did you then resume your routing through Bay Area?

A. Yes.

Q. From your experience, have you found the cost of your transportation via Bay Area and Airborne to be different?

A. I didn't compare that particular period, but another period.

Q. What period was that?

A. This was a period in June of 1951. At that time we had difficulty in Pittsburgh because our flowers, although they were moved in Pittsburgh by the same trucking outfit that moved Airborne's flowers, were delivered late afternoon, while Airborne's shipments were delivered early in the morning. As a result, our consignee complained, and told us to use Airborne.

Q. Now, you, as a member and as an officer of Bay Area, do you take part in the determinations as to the establishment of satisfactory delivery service in destination territory?

A. Yes. We don't go into particulars, but we discuss it in general.

Q. And if any change in policy is determined in

(Testimony of John Nuckton.)

that respect, how do you put those changes into effect, through what [880] office?

A. We instruct the Executive Secretary to take the necessary steps.

Q. And then he makes a survey and investigation, or an adjustment, and reports to the Board of Directors as to its acceptability?

A. That is right.

Q. Was that done in this case in Pittsburgh?

A. Yes.

Q. And, subsequent to that, has the delivery service in Pittsburgh been resumed, in not only your individual behalf, but for Bay Area, satisfactorily?

A. Yes, it has been satisfactory since then.

Q. Do you find that that is a medium of control which is not available to you in Airborne's service?

A. I didn't quite get that.

Q. Let's put it this way. Would your opportunity to determine the establishment of a satisfactory delivery service in destination territory be available through Airborne?

A. Well, there would be a means of transportation available through Airborne.

Q. But would you have the same facility and opportunity of controlling the delivering service in destination territory through Airborne that you exercise through Bay Area?

A. No; I would abide by whatever they [881] decided.

Mr. Wolf: I didn't hear that answer.

(Testimony of John Nuckton.)

Examiner Walsh: He said he would abide by whatever they decided, meaning Airborne.

Q. (By Mr. Gaudio): Were you in the hearing room when both Mr. Enoch and Mr. Bonaccorsi testified regarding the purposes and services made available to the members through Bay Area?

A. Yes.

Q. Do you find those services of particular moment and benefit in your business? A. Yes.

Q. What particular flowers are you interested in?

A. We ship all the year. We ship heather and acacia most months in the winter, and in the spring iris. Then we go to asters, then chrysanthemums and pom-poms.

Q. Are you a grower or wholesaler, or both?

A. I am a grower as well as a wholesaler and shipper.

Q. Were you ever invited to membership in an organization known as the Northern California Consolidators?

A. No, I wasn't invited, but I tried to get in at one time.

Q. Did you have any conversations with Mr. McPherson regarding membership?

A. Yes, I approached Mr. McPherson on that, and he proposed my name in a meeting, but it was turned down because at [882] that time they wanted only bona fide established shippers in the organization, and not mere growers.

Q. Did you consider yourself to be a shipper of flowers at that time?

(Testimony of John Nuckton.)

A. I was only a grower at the time.

Q. Were you shipping your products?

A. Oh, yes, I was shipping my own products.

Q. So, you have never participated as a member in this so-called Northern California Consolidators?

A. No, sir.

Q. So any testimony in this proceeding alluding membership in you is incorrect; is that right?

A. That is right.

Q. Incidentally, what are your shipments, consignment or straight sales?

A. They are at least 95 per cent consignment.

Q. And the testimony given by Mr. Enoch on the handling of consignment sales regarding the transportation charges is the same in your case?

A. That is the same.

Q. In other words, you assume the transportation charges? A. That is right.

Q. Do you find that the transportation cost is a primary factor in determining your available market in the East at destination territory? [883]

A. Yes, sir, very important. I have compared the proportion of the freight costs on the part of the carriers on a number of shipments, as against the part we get. It was over part of the month of January. We received 39 per cent of the proceeds of the flowers after commission in the East, while the carriers received 61 per cent. So it is of considerable importance.

Q. Have you made a special study of your par-

(Testimony of John Nuckton.)

ticular waybills and shipping documents to arrive at that prorating?

A. I took the figures from the consignment reports.

Q. As a member of Bay Area, that is, as a shipper of flowers, do you find that you can affect substantial savings in transportation costs? Has your experience proven that?

A. Yes. My experience during the three weeks I shipped to Pittsburgh by Airborne.

Mr. Gaudio: You may cross-examine.

Examiner Walsh: Cross-examination, Mr. Wolf?

Cross-Examination

By Mr. Wolf:

Q. Mr. Nuckton, the percentage of gross proceeds that you receive at any given time, taking out your transportation charge, of course, depends on the market for flowers, does it not? A. Yes.

Q. In other words, whereas you testified in January that 61 per cent of the proceeds went for transportation, in some other [884] month, if the market were in better shape, a smaller percentage would go for transportation, wouldn't it?

A. Well, there are always some markets in good shape and some markets in bad shape, and the average of all markets varies, of course, but not nearly as much as the average of one market would.

Q. Mr. Nuckton, you were discussing the Pittsburgh delivery service. Who handles the trucking in Pittsburgh for you?

(Testimony of John Nuckton.)

A. I don't recall the name. I would have to ask the executive secretary.

Q. Don't you know that your Pittsburgh flowers are delivered in an Airborne truck?

A. It was at that time, yes.

Q. Don't you know that they are today?

A. I am not too sure of that.

Q. How long ago was the time that you knew they were delivered by Airborne?

A. This was in June, 1951.

Q. And you don't know about today's deliveries?

A. No. I know only that the situation cleared up and that our expenses went down after we changed to Bay Area.

Q. Coming back to the time when Northern California Flower Consolidators was organized, you testified that you were a grower and also a shipper; is that right? [885]

A. A shipper in this area is considered someone who sells flowers, say, to the East. That is called a shipper. And in Florida the same man is called a broker. But here that is a shipper. A grower who ships his own stuff is still a grower.

Mr. Gaudio: That is what you have been told by some of the people in the industry; is that correct?

The Witness: Yes.

Q. (By Mr. Wolf): For instance, Mr. Zappettini at that time grew his flowers and shipped them, didn't he?

A. Yes, but he bought a lot more than he grew.

(Testimony of John Nuckton.)

So do I at the present time. So I am a shipper now, as well as a grower. I have graduated, you might say.

Q. Don't you remember that Mr. McPherson told you that he had received verbal approval of your membership from the Board of Directors of Northern California Flower Consolidators?

A. Not at that time.

Q. You don't remember that? A. No.

Q. Was there some time after that when you were notified that you could become a member?

A. On the contrary; I was told by some one of the members present, who was supposed to tell me, that my membership was not accepted. It was declined.

Q. I asked you a question a few moments ago, Mr. Nuckton, [886] about who was the delivering trucker in Pittsburgh. You testified something about a period of three weeks in June of 1951. Are you becoming mixed up as to when you were shipping entirely by Airborne?

A. I never shipped entirely by Airborne, so I couldn't be mixed up with that.

Q. But you understand my question. You do not know whether or not today your Pittsburgh flowers are delivered by Airborne's truck in Pittsburgh? A. I would assume not.

Q. When did you ship with Airborne, Mr. Nuckton?

A. During the weeks ending June 9, June 16 and June 23 of 1951.

(Testimony of John Nuckton.)

Q. Do you ship with them at the present time?

A. No, sir, except in very rare occasions, perhaps.

Q. On rare occasions?

A. Yes. I am not always there. As far as I know, we haven't shipped by Airborne for several months.

Mr. Wolf: I am showing the witness now the usual package of manifests which have been referred to before, dated December 5, 1951. This is the list that I was questioning Mr. Barulich about the other day, Mr. Gaudio, as to the difference in the hauling charges. Do you recall?

Mr. Gaudio: Yes, I recall. This document shows various shipping dates between October 1 and October 27, 1951. [887]

Mr. Wolf: By Mr. Nuckton.

Mr. Gaudio: Well, how does it read, Mr. Wolf?

Mr. Wolf: I will go through them if you want.

Q. (By Mr. Wolf): Here is an Airborne manifest dated October 1, 1951, showing John Nuckton & Company of Palo Alto as the shipper. That is you, isn't it, Mr. Nuckton?

A. That is correct.

Mr. Gaudio: What year?

Mr. Wolf: 1951.

Mr. Gaudio: What month?

Mr. Wolf: October 1.

Q. (By Mr. Wolf): It shows a Bay Area advance charge there. Here is one, October 3, 1951, an Airborne manifest showing the shipper on Oc-

(Testimony of John Nuckton.)

tober 3, 1951, John Nuckton & Company, and it shows Bay Area's advance charge. That is correct, isn't it, Mr. Nuckton?

A. I don't know what is correct about it. It is without my knowledge. It must have been that I was out of town that day, and there must have been some difficulty again.

Q. Here is another one showing John Nuckton & Company as the shipper on an Airborne manifest dated October 6, 1951. You assume these are correct, don't you? A. It is certainly news to me.

Q. As a matter of fact, on these various shipments, Mr. [888] Nuckton, you know who did your hauling to Airborne?

A. This thing says Bay Area, that is all I know.

Q. That is right. And 1951, Mr. Barulich was in charge of that department of Bay Area? In October of 1951? A. Yes.

Examiner Walsh: I think the record so shows.

Q. (By Mr. Wolf): Do you recall giving Mr. Barulich any instructions to—— A. I don't.

Q. Just a moment. (Continuing): ——to make the shipments via Bay Area?

A. I don't recall it, but I was out of town for quite a while in October, and, naturally, someone else was in charge, so I wouldn't know.

Q. Were you out of town in July, August and September of 1951, Mr. Nuckton?

A. I was in New York in July.

Q. How long did you stay there?

(Testimony of John Nuckton.)

A. I was home in August.

Mr. Gaudio: I believe the witness already testified, Mr. Wolf. And, in order that the record may be clear, he hasn't shipped for several months via Airborne.

Mr. Wolf: That is right. [889]

Q. (By Mr. Wolf): Do you recall shipping by Airborne in July, August, and September of 1951, Mr. Nuckton?

A. I looked only as far as June; June and July —early July—was as far as I looked. I didn't go any deeper into my records.

Q. In other words, you are not sure whether you shipped by Airborne in July, August, and September of 1951? A. No.

Q. But it is possible that you could have; is that correct?

A. Well, a lot of things are possible. I know nothing about it.

Q. Let me show you a statement, Mr. Nuckton, dated October 9, 1951, which is headed, "Charges Advanced Due Bay Area by Airborne Flower and Freight Traffic, Inc.," on which there appears to be charges advanced from Nuckton & Company on July 7, 1951, July 9, July 14, 16, 23, 28, 30 and 31, and also August 1, August 8, August 22, September 5—two charges—and September 8, two charges on September 10 and one on September 22. The statement finishes by saying, "Please make check payable to John C. Barulich, 1717 Belmont Avenue, San Car-

(Testimony of John Nuckton.)

los, California." There also appear other names of flower shippers on that statement.

Do you have any reason to doubt this statement, Mr. Nuckton? A. No, I haven't.

Q. Now, for these August and September shipments, Mr. [890] Nuckton, in view of the fact that the statement says the charges are payable to Mr. Barulich, is it fair to assume that Mr. Barulich made the delivery from your place of business to Airborne?

Mr. Gaudio: Just a moment. The witness has already testified that, without questioning the authenticity of these documents, they occurred either in his absence or without his knowledge, not that they are not subject to his responsibility, but the testimony previously developed on this document was very definitely exploratory in so far as Mr. Barulich is concerned, that they were, in effect, drayage charges assessed to Airborne.

Mr. Wolf: Oh, that is right, they are drayage charges. I understand.

Examiner Walsh: There is no question about that. I think that the witness is presumed to know his own business. I think he is well qualified to answer that question.

The Witness: May I have the question again?

Mr. Wolf: I will withdraw that question, Mr. Nuckton.

Q. (By Mr. Wolf): Did you ever instruct Mr. Barulich to make these deliveries to Airborne?

A. I recall instructing Mr. Barulich to ship by

(Testimony of John Nuckton.)

Airborne because we were on a spot from our consignee because of this delay in trucking.

Q. And do you now remember shipping by Airborne? [891]

A. Yes, I told you that at the outset.

Q. You testified you remembered shipping in June? A. That is right.

Q. But now you remember shipping in these other months?

A. No, I don't, because I didn't look it up.

Mr. Wolf: All right. Thank you, Mr. Nuckton.

Examiner Walsh: Mr. Stowell?

Mr. Stowell: No questions.

Examiner Walsh: Redirect examination, Mr. Gaudio.

Redirect Examination

By Mr. Gaudio:

Q. Mr. Nuckton, as president and chairman of the board of directors of Bay Area, can you state for the record whether Bay Area undertakes to handle a shipment for anyone except its members in good standing? A. They do not.

Q. In so far as you have been president and chairman of the Board, have you made it a personal responsibility on your part to observe from time to time the manner in which the officers and directors and executive secretary of Bay Area perform their duties? A. Yes.

Q. In any of that time, while you have been

(Testimony of John Nuckton.)

president, in accordance with your observation of the officers and directors, and even the members, to your knowledge does Bay Area solicit [892] traffic from anyone—that is, outright solicitation?

A. No, that is not done, except by the members personally telling other growers about the service.

Q. And by that you mean growers and receivers in destination territory, or growers in origin territory? A. Both growers and receivers.

Q. Has any application during your term of office in which the dues required by the board of directors have been tendered, been refused by the board of directors? A. Not to my knowledge.

Q. To your knowledge, since that rule of qualification of membership has been instituted, has anyone been admitted to membership without the prior payment of initiation dues and annual assessment?

A. No.

Mr. Gaudio: That is all.

Mr. Wolf: No further questions.

Mr. Stowell: I don't have a question. It is merely a comment.

Would you state for the record, Mr. Nuckton, that the finalized version of EA 324 is not available? That is the letter, you will recall, which I believe EA 323 was admitted with the qualification that EA 324 would be supplied.

The Witness: I know what you refer to, yes. I signed that. I sent that letter out. [893]

Mr. Stowell: I would like to get the record clear, Mr. Examiner, that EA 323 is admitted, and you

(Testimony of John Nuckton.)

are not expecting the receipt of EA 324, which was the number assigned to the final version which would be obtained if possible.

Mr. Gaudio: I fail to understand the question. Have you made an inspection or check to ascertain whether a carbon copy, for example, of the letter that you ultimately issued is available?

The Witness: There isn't any, no. I have looked for it, and there isn't any.

Examiner Walsh: I received Exhibit 323 subject to receiving the copy of the actual letter mailed, which I reserved for 324.

Mr. Stowell: At this time, will you remove the condition——

Examiner Walsh: There is no condition to it, except Exhibit 324 will be a blank.

Mr. Gaudio: I will call Mr. Zappettini.

Whereupon:

WILLIAM ZAPPETTINI

recalled as a witness for and on behalf of Bay Area, having been previously sworn, was examined and testified further as follows:

Direct Examination

By Mr. Gaudio:

Q. Mr. William Zappettini, what is your occupation and address, please? [894]

A. The present occupation?

(Testimony of William Zappettini.)

Q. Yes.

A. I am a wholesale florist, and shipper and grower.

Q. Where do you have places of business?

A. I have a place of business at 160 Fifth Street, San Francisco; 750 Wolf Street, Los Angeles, and 1022 East Industrial Boulevard, Dallas, Texas, and I don't know the address in Fort Worth, Texas.

Q. How long have you been engaged in the flower business in this area?

A. Approximately thirty years.

Q. Did you originate your business in the San Francisco Bay Area? A. Yes.

Q. And in that period have you augmented it with the places of business you have just described? You have increased your places of business in the places indicated? A. That is right.

Q. Do you grow flowers as well? A. I do.

Q. What kind of flowers do you grow particularly?

A. At present, I am growing field growing flowers. In the past time, I operated a greenhouse for several years, such as roses, gardenias and asters and carnations.

Q. You have sold these flowers on the market in the [895] wholesale trade? A. Yes.

Q. Both locally and in the East? A. Yes.

Q. In your experience, have you used various forms of transportation? A. Yes, many.

Q. I take it, then, that you have, even prior to

(Testimony of William Zappettini.)

the advent of air cargo for flowers, used rail transportation?

A. We used, in the early stage, rail trucks. That is about all we had in the early part, before the 30's.

Q. The particular product of flowers requires special handling, does it not, in transit?

A. Always.

Q. How does it move, in refrigerated cars?

A. When that was available, the facility was made to us; in the early part, in 1927 and '28, we made first movement by "reefer" car to the far East, over east to Chicago, and then, of course, more facilities came in, and we had almost daily refrigeration from San Francisco to Chicago, with the exception of Sundays and holidays.

Q. What particular consideration eventually prompted you to utilize air carrier service for the transportation of flowers to the eastern markets?

A. Well, it gives us a tremendous advantage on this end of [896] the country that we can move the flowers overnight to many cities in the United States, and, consequently, we ship more flowers.

Q. By that you mean, if you can land your flowers at a basis that would ensure favorable competition with the eastern markets, that you would utilize air carrier service; is that correct?

A. We use the fastest and the best possible service that we can obtain.

Q. Is the cost of that expedited service of primary consideration in making available to you the markets in the eastern destination territory?

(Testimony of William Zappettini.)

A. Of course, we have to watch that the cost does not become too high.

Q. Is there a definite cost ratio beyond which the cost of transportation makes it prohibitive to indulge in the eastern markets?

A. Yes, especially such a period as we are now, as we have been in the last two or three years.

Q. Until about the fall of 1949, when Consolidated Flower Shipments, as it was known then, was first organized, did you ship by air?

A. We shipped by air. I believe we started in 1937 and '38, and then we were stopped by the war. It became non-essential, I mean, and we were forced by the war to stop shipping by air. [897] And then, after the war was over, we resumed shipments by air.

Q. What service did you use at that time?

A. In the early part, in the early stage, we used to just air ship them, we called it then. I don't remember the classification, but there was straight shipment; we delivered to the airline, and out they went. Then the air express came into play. That was prohibitive. And then we started to make a straight shipment to the airline.

Q. Has your experience in that service indicated that the larger the pool or the consolidation, the more economical form of transportation you can enjoy?

A. We started to notice considerable went to the airlines, when they started to publish a tariff, and some air cargo lines came into the picture at that

(Testimony of William Zappettini.)

time, and they started shipping flowers. And they gave us a tariff, and they gave us an illustration how the flowers can be landed cheaper at most cities.

Q. Did you say whether you used Airborne's service prior to the organization of Bay Area? Have you used Airborne? A. Yes.

Q. While you were using Airborne, did you have an opportunity to examine the cost of your transportation prior to Bay Area's organization?

A. Will you repeat the question?

Q. Prior to Bay Area's organization, have you since made a survey to determine the cost of Airborne's service at that time? [898] A. Yes.

Q. Have you made a comparison between the cost of that service per box and the cost to you per box since your participation in the Bay Area organization? A. Yes.

Q. Have you any way of telling us what the average differential on a per box basis is?

Mr. Wolf: Mr. Examiner, the time period is important again, please.

Mr. Gaudio: Well, was it for that period, just before and after?

Mr. Wolf: The formation of Bay Area, you mean?

Mr. Gaudio: The formation of Bay Area, yes.

A. Well, before the formation of Bay Area—I am speaking around 1947 and '48—the shipping became very high; the transportation began to give us trouble.

Examiner Walsh: Can you confine it to within

(Testimony of William Zappettini.)

a period of about a month before Bay Area was formed, so that we can get a fair picture of the comparison?

The Witness: Before Bay Area took place?

Examiner Walsh: You might try to state for the record, which I believe another witness did before, that after joining Bay Area he had certain savings. Maybe that would be a better way of putting it.

The Witness: Yes. In other words, Bay Area started in [899] '49, in October. In September, 1949, we used Airborne. There we noticed a great deal of difference on the same amount of boxes, for the same city. It was a considerable saving.

Mr. Wolf: Mr. Examiner, I dislike interrupting, but I would like to ascertain the foundation of this comparison. One might have been a direct shipment and the other might have been a consolidated shipment, which, of course, would not be comparative.

Examiner Walsh: I am assuming that we are taking into account the shipper's entire expense during the period immediately before, and all shipments he made after, within, say, about a month after Bay Area was formed, so that he might be able to extract some sort of a figure with respect to all shipments.

Q. (By Mr. Gaudio): With respect to the time element, Mr. Zappettini, what has your examination determined to be the differential per box?

A. Well, if we take the chrysanthemum season, from San Francisco to Chicago, I ship "mums" in

(Testimony of William Zappettini.)

October and in November, which are the same item and the same weight, same dimensional weight, same destination, same amount of flowers in a box, we find, like in Chicago, the differential was perhaps as high as $2.50 per box.

Q. Could you give us an approximation for that period, say, September of 1949, and October of 1949? Can you tell us how many boxes you might have shipped by air, via Airborne, [900] during September, and via Bay Area during October, Mr. Zappettini?

A. On a single day or a single month?

Q. Let's start with a day, on a daily basis, if you can tell us, on the average.

A. Of course, we don't ship them all to Chicago. The amount of boxes shipped by air, say, give it to Airborne, in a previous month, a day will be fifty or sixty boxes, more some days and some days less, and the same thing will occur a month later. November really is not a heavy shipment, as heavy as October. September and October will be the two parallel months.

Q. On that basis, Mr. Zappettini, would it be a reasonable estimate to say that you could effect a maximum saving of some $200 per day via Bay Area during that period?

A. Well, that will be an assmuption, because, as I said, we didn't ship them all to a particular city. However, the saving that was being recognized was a great saving.

Q. Are there periods of time when you do not

(Testimony of William Zappettini.)

ship at all? In other words, is there any lapse in shipments due to flower seasons, in your instance, or is there a continual turnover of various classes of flowers?

A. We ship the year round, changing from item to other item. I mean to say that sometimes we ship heavy and sometimes we ship light. That will all depend on holidays and seasons of the year, such as at Easter time, Mother's Day; and asters last for about a month or a month and a half, and chrysanthemums [901] season is about three to four months; but we do ship all the year round.

Q. On the annual basis, then, this saving which you effect through Bay Area could become a substantial sum, could it not? A. I believe so.

Q. In the initial organization of Bay Area, did you individually contribute any funds for its incorporation? A. Yes.

Q. And at the outset there was no dues requirement for members, was there, under the articles?

A. No.

Q. But persons would be admitted to membership if approved by the board of directors?

A. Yes.

Q. Subsequently, during your term of office as President, formerly as president, and chairman of the board of directors, was the initiation fee and annual membership dues established by the board of directors? A. Yes.

Q. And you personally are a member in good

(Testimony of William Zappettini.)

standing in accordance with that rule of the board?

A. Yes.

Q. In your office as president, to your knowledge, did Bay Area, as such, actively solicit any traffic from anyone other [902] than its own members—solicit business, in other words?

A. Our office, you mean to say?

Q. No, Bay Area.

A. Bay Area ever solicit members?

Q. Solicit traffic. A. Oh, yes, sure.

Q. And under whose auspices would that be done?

A. It would be done by the president or the board of directors; or the annual meeting, or semi-annual meeting, whatever it might be.

Q. And would you discuss various applications, if any applications for membership had been presented? A. We did.

Q. To your knowledge, what was the maximum number of members that were ever admitted to Bay Area? A. From twenty to twenty-five.

Q. And outside of those members which had been admitted either in the beginning or subsequently on the payment of dues, has Bay Area gone beyond the membership roster and accepted traffic, to your knowledge, from any non-member?

A. No, only the people that were members, and they were listed on the roster and were paid-in members, paid all the dues. They were admitted to membership.

Q. You were in the hearing room, I presume,

(Testimony of William Zappettini.)

when Mr. Bonaccorsi, Mr. Enoch and Mr. Nuckton were testifying regarding [903] the responsibility or the recognition of responsibility as between Bay Area and its members on the loss of shipments?

A. Yes.

Q. And is that policy in accordance with the by-laws and the determination of the board of directors of Bay Area? A. Yes.

Q. You, as an individual member shipper, abide by that policy, do you not? A. Yes.

Q. Incidentally, have I asked you if you ship on consignment basis or straight sales?

A. Most of our sales are straight sales.

Q. In so far as the loss of straight sale shipments are concerned, do you ever look to Bay Area or expect recompense from Bay Area as a corporation for reimbursement of your loss? A. No.

Q. You have heard Mr. Barulich testify that as executive secretary he carries into execution the directions of the board of directors and the members with respect to loss and damage claims?

A. Yes.

Q. The routine procedure described by Mr. Barulich is in keeping with your policy as a member, and member of the board of directors?

A. Yes. [904]

Q. You referred to some difficulty prior to the inception of Bay Area regarding your transportation. Was that over any particular phase or element of the transportation service?

A. The transportation difficulty arising was

(Testimony of William Zappettini.)

around early '46 or '47, right after the war, and business was pretty poor at that time, and all kinds of shipments began starting, and we found a lot of discrepancies and a lot of errors occurred very frequently in those shipments, and then we started to check up, and that is when we realized that the errors were occurring.

Q. Those discrepancies having o c c u r r e d with C.O.D. remittances?

Mr. Wolf: Just a moment, Mr. Examiner. I don't know what that has to do with the issues of this case. I think the witness is talking about 1947 and 1948.

Mr. Gaudio: He indicated that they were all difficulties that brought up the inception of Bay Area.

Mr. Wolf: I don't believe that he predicated his answer on that, Mr. Examiner.

Mr. Gaudio: Could we have my last question and Mr. Zappettini's reply read?

Examiner Walsh: Will you read it, Mr. Reporter?

(Record read.)

Mr. Gaudio: I will rephrase the question.

Q. (By Mr. Gaudio): Were those conditions taken into account in the [905] determination of policy in the formation of Bay Area?

A. At the time we started, we got to do something about it, we cannot longer proceed in the same way, we have to improve it, do something about it.

(Testimony of William Zappettini.)

Q. There is some discussion in these proceedings regarding competition between the members of Bay Area. Mr. Zappettini, are you aware of any competitive factors as between the members of Bay Area that have anything to do with their mutual transportation problems?

A. You will have to explain a little more.

Q. Is there any competitive factor between the members of Bay Area that has any relation to the kind of service they are getting from Bay Area or any other carrier? A. I can't get that.

Q. Does competition, if any, exist between the members in any way involve the service which you anticipate receiving from your organization known as Bay Area? In other words, is there any competition? A. Yes, there is plenty competition.

Q. Do you consider that factor to affect in any way the manner in which Bay Area functions for your benefit? A. Yes.

Q. In what respect?

A. In the Bay Area shipping that we are making we know all the time whether we can ship merchandise to our consignees [906] at a certain price, and what effect they have on the consignee to ship those flowers at that price. We know that they can sell them at a profit.

Q. Are you referring now to meeting competition in destination territory?

A. When I do sell merchandise, I am in need to know what the cost of the merchandise should be

(Testimony of William Zappettini.)

to my consignees or to my customers on the other end.

Examiner Walsh: I don't think that is responsive to the question. Are you trying to develop something with respect to preferential treatment as between——

Mr. Gaudio: It was indicated by the enforcement attorney that inasmuch as Bay Area members are all wholesalers or growers they are in competition with each other and cannot sleep in the same bed, as it were, through their mutual interests in Bay Area.

Examiner Walsh: The competition is for eastern markets, eastern business?

Mr. Gaudio: The fact that they were competitive in this area, yes.

Examiner Walsh: Competitive from their own business standpoint.

Mr. Gaudio: Do you understand that?

The Witness: I can answer now. No; no shipper is competitive. [907]

Q. (By Mr. Gaudio): At any event, they don't let competition enter into their relationship as members in this organization?

A. As a shipper, regardless if he belongs to Bay Area or belongs to any group, he is in competition.

Examiner Walsh: Now you have come around to my question.

Do you have much more examination?

Mr. Gaudio: Just a couple of items.

(Testimony of William Zappettini.)

Q. (By Mr. Gaudio): Mr. Zappettini, do you know an individual by the name of Harry Avila?

A. I do.

Q. When did you first come to know him?

A. I know him for quite some time, before 1948.

Q. Did you meet him prior or subsequent to your first meeting with Mr. John C. Barulich?

A. I met him before.

Q. Where did you meet him?

A. I met him at my office, and he also visited at my home.

Q. Was he at one time considered as a possible representative, as indicated in this record, as traffic manager for this group of shippers? A. Yes.

Q. Did he ever meet with the members of the group? [908] A. Yes.

Q. He wasn't retained, however? You didn't employ him? A. No.

Q. Was it after that that you discussed the matter with Mr. Barulich? A. Yes.

Q. Were there any others that you had considered as traffic manager or agent?

A. Well, at that particular time, there was a Mr. Avila very much in play in that discussion. We had a meeting, two meetings, and he was turned down. And the next movement was when Mr. Barulich was brought into the picture by Mr. Reynolds.

Q. Do you recall the time when Mrs. Decia ceased to have any further connection with the Bay Area group?

(Testimony of William Zappettini.)

A. I don't know specifically the time, but it was at the beginning of the forming of Bay Area.

Q. Was that in accordance with the wishes and the directions of the members and the board of directors of Bay Area?

A. Yes, it was discussed. We had a meeting, and it was approved in a general way.

Q. And who was brought into the organization as secretary after that?

A. It was Mr. Barulich.

Q. At that time, the office of executive secretary was then introduced; is that right? [909]

A. Yes.

Q. Is Mr. Barulich an authorized—is he, or was he, you can state for the record—an authorized signator to the bank account of the association?

A. Yes.

Q. That was pursuant to a meeting of April 14, 1950, which is part of this record? A. Yes.

Q. Mr. Zappettini, have you sustained loss or damage to your shipments in the past?

A. Plenty.

Q. Have any of them occurred which have been an outright loss to you without recompense?

A. Yes, sir, many.

Q. In those instances, have you ever undertaken or seen fit to look to Bay Area for recompense?

A. No.

Q. Do you understand that under the articles and bylaws of Bay Area there is no recourse by

(Testimony of William Zappettini.)

the member for the loss or damage to a member of the corporation? A. I do.

Q. And with that knowledge you entered into the membership of Bay Area, and that policy is acceptable to you? A. Yes.

Q. I show you a number of documents, one of which is [910] labeled Airborne's Air Freight Waybill and Invoice, No. 98523, dated May 18, 1951, I think it is. I believe it is May 10, 1951. And I ask you if this was given you at the time the shipment was tendered to Airborne?

A. If the shipment was what?

Q. If this document was given to you at the time your shipment was tendered to Airborne for transportation.

A. That I couldn't tell you. Perhaps I can examine it and check. I am not too familiar with the shipping department. I think this is a receipt mailed back to us by the consignee.

Q. Now, I call your attention to the copy entitled "Shipper's Copy." Does that show on it there were charges for pick-up, consolidation or delivery services? A. No.

Mr. Gaudio: We offer this as respondent's exhibit next in order.

Examiner Walsh: Exhibit No. 12.

(The document above referred to was marked for identfication as Bay Area's Exhibit No. 12.)

Examiner Walsh: Do you have any objection to carrying cross-examination over until Monday?

(Testimony of William Zappettini.)

Mr. Wolf: No, not at all.

Mr. Gaudio: Is there any objection to the introduction of this document?

Mr. Wolf: No. [911]

Mr. Gaudio: May it be received at this time?

Examiner Walsh: Shipper's copy of Airborne's waybill and invoice, marked for identification as Bay Area's Exhibit No. 12, will be received in evidence, in the absence of objection.

(The document marked as Bay Area's Exhibit No. 12 for identification was received in evidence.)

Mr. Gaudio: With that, I conclude my direct examination of Mr. Zappettini.

Examiner Walsh: We will recess at this time until 9:30 Monday morning.

(Whereupon, at 5:40 o'clock, p.m., the hearing was adjourned until Monday, March 3, 1952, at 9:30 a.m.) [912]

Proceedings

March 3, 1952.

Examiner Walsh: Come to order, gentlemen.

Before we proceed with further examination of Mr. Zappettini, I would like to make clear for the record the fact that Respondents have agreed that all of the testimony taken in executive session will be made a part of the public record, with the exception

of the photostatic copies of Mr. Barulich's income tax returns for the years 1949 and 1950.

Do you agree with that, Mr. Gaudio?

Mr. Gaudio: That is correct, sir.

Examiner Walsh: And you will show such in an amendment to the motion which you will file?

Mr. Gaudio: I will file it immediately following the conclusion of the oral hearing, amending the motion in behalf of Mr. Barulich.

Whereupon,

WILLIAM ZAPPETTINI

resumed the stand and testified further as follows:

Direct Examination
(Continued)

By Mr. Gaudio:

Q. Mr. Zappettini, during your earlier testimony, you indicated that you had been having difficulties with Airborne in the handling of your shipments. I am speaking now of the time just prior to Bay Area, when Bay Area was organized.

Was one of those elements in question the remittance of [917] C.O.D. collections? A. Yes.

Q. I show you a statement entitled, "Unpaid C.O.D.'s, Airborne Flower & Freight Traffic, Inc., for the period April 26, 1949, to August 1, 1949," together with your shipping invoices attached, and ask you if this list and attached invoices correctly show the shipments handled by Airborne for the commodity indicated during that period; is that correct?

A. Yes, this is correct, by our bookkeeper.

(Testimony of William Zappettini.)

Mr. Gaudio: We offer this as Respondent's exhibit next in order at this time.

Examiner Walsh: The foregoing exhibit is marked for identification as Bay Area's Exhibit No. 13.

(The document above referred to was marked for identification as Bay Area's Exhibit No. 13.)

Q. (By Mr. Gaudio): This BA No. 13 for identification, with various invoices dated from June 4, 1949, through July 5, 1949, shows total outstanding collections in the sum of $2,498.92, for your account in the hands of Airborne during that period; is that correct? A. That is correct.

Q. And I show you a letter dated June 23, 1950, addressed to Airborne Flower & Freight Traffic, Inc., registered, return receipt requested, which receipt is thereto attached, which is [918] approximately a year later, and ask you if that was your final letter of demand given to Airborne, which was issued over your signature? A. Yes.

Q. Following that letter, did you receive satisfaction on your outstanding C.O.D. collections as indicated by BA Exhibit No. 13?

A. Yes, we received a check for it.

Mr. Gaudio: We offer this as Respondent's Exhibit No. 14, for identification.

(Testimony of William Zappettini.)

Examiner Walsh: Letter from Mr. Zappettini to Airborne, dated June 23, 1950, will be marked for identification as Bay Area's Exhibit No. 14.

(The document above referred to was marked for identification as Bay Area's Exhibit No. 14.)

Q. (By Mr. Gaudio): Was this period for these invoices indicated on Exhibits 13 and 14, the only occurrence in your experience with Airborne on the matter of C.O.D. collections?

A. You say, was it the only one?

Q. The only one.

A. We had, at a later time in 1951, too.

Mr. Wolf: Mr. Examiner, in regard to anything occurring as late as 1951, I am going to object, as all of this has been offered apparently to show that Mr. Zappettini was having [919] trouble prior to or about the time of the formation of Bay Area.

Mr. Gaudio: Mr. Examiner, the impetus which brings an organization into being may continue. We consider it relevant to the issue, mainly as to the reasons for the organization, and the continuance desired by the shippers.

One of the serious considerations is the early receipt of remittances on C.O.D. collections.

Examiner Walsh: Objection overruled.

Q. (By Mr. Gaudio): I show you another file of documents, Mr. Zappettini, attached to a letter demand of June 8, 1951, addressed to Airborne Flower & Freight Traffic, Inc., together with your shipping invoices and a voucher attached thereto,

(Testimony of William Zappettini.)

and ask you if those are additional to the ones referred to in Exhibit BA 13? A. Yes.

Q. What was the total outstanding C.O.D. collections on this number of shipments?

A. The amount in June is entered here—June 11, $4,536.17, a check for that.

Q. You received a check for that on June 11, 1951? A. Yes.

Mr. Gaudio: We offer this as Respondent's Exhibit next in order, No. 15.

Q. (By Mr. Gaudio): Have you found, Mr. Zappettini, that your membership [920] in Bay Area, together with the supervision exercised therein by you as a member, has facilitated the attention to returns in the matter of C.O.D. collections?

A. Yes, very much so.

Examiner Walsh: Letter from Mr. Zappettini to Airborne, dated June 8, 1951, and attached shipping documents of the William Zappettini Company, are marked for identification as Bay Area's Exhibit No. 15.

(The document above referred to was marked for identification as Bay Area's Exhibit No. 15.)

Q. (By Mr. Gaudio): As President and Director of Bay Area, has this subject of C.O.D. collections come up before the Board for discussion on numerous occasions? A. Yes.

Q. And in that connection, does the organization

(Testimony of William Zappettini.)

through its officers and directors, exercise direct control over the executive secretary for that purpose? A. They do.

Q. Do you recall the testimony of Mr. Barulich early in this hearing, regarding the control exercised by the Board of Directors in the matter of routing and handling of shipments?

Do you recall that testimony? A. Yes.

Q. I show you a mimeographed sheet entitled, "Bay Area [921] Shippers & Growers, Inc.," dated July 12, 1949, and ask you if you recall issuing that document at that time? A. Yes.

Q. This document issued over your signature as the then President, under the then name of Bay Area as Bay Area Shippers & Growers, Inc., July 12, 1949? A. Correct.

Mr. Gaudio: We offer this as Respondent's exhibit next in order, No. 16, for identification.

Examiner Walsh: The document over Mr. Zappettini's signature, and entitled, "Bay Area Shippers & Growers, Inc.," is marked for identification as Bay Area's Exhibit No. 16.

(The document above referred to was marked for identification as Bay Area's Exhibit No. 16.)

Q. (By Mr. Gaudio): I show you a carbon copy of a letter dated June 26, 1950, addressed to Mrs. Virginia Decia, Secretary, Northern Califor-

(Testimony of William Zappettini.)

nia Flower Consolidators, and ask you if the original of that issued over your signature as of that date? A. Yes.

Mr. Gaudio: Does counsel have any objection to my reading it into the record? It is very brief.

"Dear Mrs. Decia: Due to the precarious position in which I find myself, I hereby submit my resignation as President of the Northern California Flower Consolidators. [922]

"Very truly yours, William Zappettini Company, by William Zappettini."

Examiner Walsh: Do you wish to have that marked for identification?

Mr. Gaudio: Yes, mark it for identification as Exhibit No. 17.

Examiner Walsh: Mr. Zappettini's letter to Mrs. Decia as of June 26, 1950, is marked for identification as Bay Area's Exhibit No. 17.

(The document above referred to was marked for identification as Bay Area's Exhibit No. 17.)

Q. (By Mr. Gaudio): Mr. Zappettini, have you examined the Western Florists Directory of May, 1951, to ascertain the number of growers and shippers of flowers listed therein?

A. Yes, I see it occasionally.

Q. And it is true, is it not, that on page 66, under the heading, "Shippers, San Francisco Area" are listed 27 under that designation?

(Testimony of William Zappettini.)

A. Yes.

Q. And under the heading of, "Members, San Francisco Flower Growers Association, and others," on pages 66 and 67, there is a total of 131 such individuals or travelers?

A. More or less, about that.

Q. And on pages 67 and 68, under the heading of, "Members [923] of the California Floral Markets, Inc.," it shows a total of 71; is that correct?

A. That is correct.

Q. That latter group, the California Floral Markets, Inc., is the Japanese section of the trade or industry; is that correct? A. Yes.

Mr. Gaudio: Without offering the book in evidence, Mr. Examiner, I would like to read from page 67.

Adachi Nursery, and K. S. Yamane appear in that particular list. They were individuals testifying previously, in this hearing.

Q. (By Mr. Gaudio): That shows in the aggregate a total of 229 in the San Francisco Bay Area and Peninsula; is that correct?

A. Yes, more or less. Of course, some go out, and some come in.

Q. This was as of 1951; is that right?

A. Yes.

Q. From your knowledge and experience in the production and shipment of flowers in this area, are all of those listed variously, prospective shippers of flowers in interstate commerce?

(Testimony of William Zappettini.)

A. I will say that the great majority will be shipping flowers. [924]

Q. By one form of transportation or another?

A. Yes.

Q. Mr. Zappettini, during your office as President, did you experience any need for revision or change in the agency or contract truckers' arrangements which Bay Area had in destination territory? A. Yes, I did.

Q. Do you recall the testimony of Mr. Barulich in that connection, regarding the truckers employed by Bay Area in destination territory?

A. Yes.

Q. As an officer and director of Bay Area, have you found that the organizational setup in behalf of the member shippers, gives you, as a member shipper, a measure of control over the contract trucker which you would not otherwise enjoy via Airborne? A. I do.

Mr. Gaudio: You may cross-examine.

Examiner Walsh: Cross-Examination, Mr. Wolf.

Cross-Examination

By Mr. Wolf:

Q. Mr. Zappettini, the other day, if I understood your testimony correctly, you said that when Bay Area started, or within a month or so, or a few months thereafter, you made comparisons of Bay Area's charges and Airborne's charges. And

(Testimony of William Zappettini.)

did [925] you say that in September and October of 1949, you compared the Airborne charges and the Bay Area charges for those months?

A. I recall I testified that they would be the best month or two to make a comparison, like September or October. That is what I believe I testified.

Q. In other words, you compared shipments that you made in September and October of 1949, where you made shipments by Airborne and by Bay Area, during those months?

A. I believe we did. I am not positive, but I believe we did, because we are shipping daily, and sometimes we use Airborne, and sometimes we use Bay Area.

Q. When did you make this comparison?

A. I imagine we made them at that time.

Q. You made them at that time?

A. I suppose, at that time.

Q. Have you looked at any of your records since then?

A. I looked several times at the records, yes.

Q. When was the last time you looked?

A. I could not give you the specific date, but as routine in my office I do look at the charge made to ship them, always.

(Testimony of William Zappettini.)

Q. And you remember now, that you shipped in September and October, and made comparisons then?

A. I did not testify that I made the comparison at that time.

Q. No, but you shipped at that time? [926]

A. I believe we did.

Q. Before Bay Area was formed, did you make all your shipments by Airborne?

A. Not all the shipments.

Q. Where did you make the others?

A. We made some straight shipments direct to the air line, and some air express, and some rail express.

Q. Do you recall in your experience, Mr. Zappettini, on consolidations, having seen the Airborne rate lower than the Bay Area rate?

A. No, I do not.

Q. You think that if you shipped 5,000 pounds by Bay Area, you can do it as cheaply as you could by Airborne?

A. Well, I do not know. I am not familiar with the Airborne traffic rates. However, I know that we ship them cheaper. I do not say the quantity, but we do ship cheaper, we did make that comparison when we shipped with Bay Area—than we can with Airborne.

Q. Mr. Zappettini, referring to these C.O.D.'s which you have put in evidence, that you claim

(Testimony of William Zappettini.)

were unpaid by Airborne for some period of time, you eventually received one check in full, did you not?

A. The check was for some of the C.O.D.'s back in 1947. You wanted the last check, you mean?

Q. No. You testified that you received a check for [927] $4,536.17, from Airborne, on June 12, 1951? A. Correct.

Q. Did that cover the C.O.D.'s listed in Exhibit No. 14, and Exhibit No. 15, as well as the C.O.D.'s listed in Exhibit No. 13? A. That is right.

Q. That was the settlement for these two big bunches of C.O.D.'s that were unpaid; is that correct? A. That is right.

Q. Do you remember why those were unpaid, Mr. Zappettini?

A. Well, just did not get the check.

Q. Let me try and assist your recollection a little bit.

Do you remember you made a rather large shipment of flowers, and you put in a claim to the insurance company on them?

Do you remember that?

A. I remember very well.

Q. And as a matter of fact, you had sold those flowers at a profit, you remember that?

A. Well, I do not think we know about it, because we put in the claim.

Q. Do you not remember that you were an in-

(Testimony of William Zappettini.)

sured under that particular policy, along with Airborne? A. That is right.

Q. And you put the claim in to the insurance company? A. That is right. [928]

Q. And the insurance company turned it down, do you remember that?

A. I do not know if they turned it down. We got paid.

Q. The insurance company did not pay you the amount of your claim, did it?

A. The insurance company paid us according to the amount of the settlement.

Mr. Gaudio: Are you speaking now of the loss or damage to the shipment?

Mr. Wolf: I am trying to find out, Mr. Gaudio. I do not know all of the detailed facts.

Q. (By Mr. Wolf): Mr. Zappettini, you remember you wanted a thousand dollars more than the insurance company paid you?

Mr. Gaudio: On C.O.D. collections, or on——

Mr. Wolf: This was on a damaged shipment, was it not?

Mr. Gaudio: Just a moment, Mr. Zappettini.

This is improper Cross-Examination, Mr. Examiner. We made no reference in this particular line of inquiry—if that is your purpose—regarding valuation.

This is a matter of C.O.D. remittances.

Mr. Wolf: Mr. Examiner, this is all preliminary as an explanation of these unpaid C.O.D.'s.

(Testimony of William Zappettini.)

Mr. Gaudio: The only explanation on a C.O.D. is that the carrier did not get the money. [929]

Examiner Walsh: I think we really should have some more facts.

Mr. Wolf: I am trying to develop the facts. I have to start at the beginning.

Examiner Walsh: Proceed.

Q. (By Mr. Wolf): Mr. Zappettini, you wanted a thousand dollars more from the insurance company than they paid you, do you remember that?

A. You are going to let me reveal this thing properly?

Q. Go ahead, if you want to tell it.

A. This claim was put out long after this 1947 C.O.D. was due Zappettini Company.

Mr. Wolf: Pardon me.

Mr. Examiner, there are no 1947 C.O.D.'s. They are 1949 and 1951, I believe.

Mr. Gaudio: The witness, in answer to one of your earlier questions, indicated that he had C.O.D. remittance problems as early as 1947.

Examiner Walsh: Let us see if any of these C.O.D.'s involved claims for damaged shipments. I think unless we have that fact established, that this may not be proper examination with respect to these particular items.

Mr. Gaudio: That is right.

The Witness: Mr. Examiner, we can prove that those C.O.D.'s, [930] there was no claim on the C.O.D.'s due for anything at all. It was just a—

(Testimony of William Zappettini.)

just C.O.D. money remittances coming back to the William Zappettini Company. There was no delay for any purpose, on that.

Q. (By Mr. Wolf): Mr. Zappettini, do you remember that you had a dispute with Airborne about the claim you put in with an insurance company, and the insurance company would not pay you as much as you wanted? A. That is correct.

Q. And do you remember that thereafter, Airborne had prepaid some shipments for you, and you would not pay Airborne the prepaid shipments?

Do you remember that? A. That is correct.

Q. And do you also remember that Airborne then withheld from you the C.O.D. collections that it had made, because you were holding out from them the prepaid expenses that they had made for you? A. That is not correct.

Q. Did you not have a big dispute with Airborne about that insurance claim?

A. We had a dispute about the insurance, because we did have the insurance, and the insurance company, they were not accepting Mr. Airborne's say-so. The insurance was Airborne's. [931]

The insurance company, they were requesting about paying the thousand dollars insurance that we had on our shipment, therefore Mr. Airborne had the difficulty in getting the insurance company to pay Zappettini Company the money, that thousand dollars insurance, on the shipment that we had.

And we had a difficulty in getting it.

(Testimony of William Zappettini.)

Q. I see. But you held out some prepaid charges against Airborne, did you not? A. Yes.

Q. Did not Airborne hold out at that time, some C.O.D.'s from you, because you would not pay the pre-payments?

A. Mr. Airborne wrote to me, and sent me a statement, and I sent him a check in amount approximately what those payments were due for transportation on Airborne.

Q. How much of those pre-payments did you hold out?

A There was about a thousand dollars. We sent them a check for that.

Q. That is right. And then did not Mr. MacPherson tell you that they were going to hold some of your C.O.D. money until you were settled on the pre-payments?

A. That was on the last '51 payment. This last '51 payment, they held out some of that C.O.D. money; but in the previous time, there was not anything involved on that, at all.

Q. Now, what is the date of that resignation of yours from Northern California, Mr. Zappettini? [932] A. I think June 26, 1950.

Q. And Bay Area had been formed about a year earlier, do you remember? A. Yes, '49.

Q. In June of 1949. And you had been elected President of Bay Area; and after Bay Area was formed, you shipped by Airborne for how long?

A. I do not know how long we did ship. We shipped some shipments every day or so. There was

(Testimony of William Zappettini.)

always some shipments going out, whatever the route called for. That I do not know, how much we shipped.

Q. Do you not know as a fact that in 1949, Mr. Zappettini, your last shipment by Airborne, was on August 10? A. Well, I do not know that.

Q. Do you not remember that you shipped for just two months after Bay Area was formed in June of 1949? A. Perhaps we did.

Q. Just two months. Do you remember that?

A. But we ship continually with Airborne.

Q. How many shipments did you make with Airborne in September of 1949?

A. Well, I could not tell you that, how many shipments we made. It would be impossible for me to tell you how many shipments we made.

Q. You remember you did ship with them, in 1949, in [933] September?

A. To my best recollection, the answer is that we shipped whatever is necessary with the route that we decided to ship, and I do not know just how many shipments we made.

Q. Do you know what truckers handle your deliveries in Pittsburgh, Mr. Zappettini?

A. No, I do not.

Q. Mr. Zappettini, you are Vice-President now of Bay Area, are you not? A. Yes.

Q. And the Board of Directors exercise control over the deliveries at the receiving end?

A. We make a determination on our board, and we instruct the secretary to follow through.

(Testimony of William Zappettini.)

Q. You have testified that there are 229 potential shippers in this area?

A. I did not put the word, "potential."

Q. Well, I think your counsel used that, in questioning you. If we went through this list of 229, do you think you could pick out the number of air shippers?

A. Well, you can pick up a larger number than in this list.

Q. Do you remember that you found a differential as high as $2.50 a box, between Bay Area and Airborne? A. Yes. [934]

Q. Can you produce shipping documents, showing that difference? A. Yes.

Q. Will you bring some——

A. I have them here with me.

Mr. Gaudio: Have you got them with you?

The Witness: Yes.

Mr. Gaudio: Fine.

Mr. Wolf, have you had a chance to examine those documents?

Mr. Wolf: To some extent.

Mr. Gaudio: I am just wondering if we could not include Mr. Zappettini's comparisons in this comparative statement we are going to make?

Mr. Wolf: I am going to ask him about these.

Mr. Gaudio: Very well.

Q. (By Mr. Wolf): Mr. Zappettini, you have just handed me a statement of Airborne, showing a shipment on April 16, 1951, to Dallas, Texas?

(Testimony of William Zappettini.)

A. Yes.

Q. From Oakland? A. Yes.

Q. From Oakland?

A. Yes.

Q. You have also handed me a statement, or rather, an air bill, of American Airlines, from San Francisco to Dallas, Texas, a shipment on April 7, 1951? [935] A. Yes.

Q. Now, did you use these two documents to make a comparison of charges? A. No.

Q. You did not? A. No.

Q. Well, there is no comparison to make here, is there? A. It is a big comparison.

Q. Well, go ahead and make it.

A. Between the transportation.

Q. All right. Where is the higher transportation?

A. The higher transportation is on the Airborne.

Q. Will you notice that on the Airborne shipment, there were four boxes? A. Yes.

Q. And they were four-foot boxes?

A. That is correct.

Q. On the American Airlines bill, there are four boxes, but they are three-foot boxes; is that correct?

A. That is right.

(Testimony of William Zappettini.)

Q. Will you notice that the air carriers' rate on the Airborne bill, is $18.34? A. Yes.

Q. Will you now look at the rate on the American Airlines bill. That is also $18.34, is it not? [936]

A. Correct.

Q. Will you notice that the weight on the American Airlines bill is 181 pounds? A. Yes.

Q. And the weight on the Airborne bill is 265 pounds? A. Well, now——

Q. Wait a minute. Do you notice that?

A. Yes, I do.

Q. If you take the weight of 181 pounds, times the rate of $18.34, and multiply it, you will come out with $33.20, will you not? A. Correct.

Q. And you take the 265 pounds times the rate of $18.34, you will come out with $48.60, will you not? A. That is right.

Q. So there is $15 difference right there, due to weight, is there not? A. That is right.

Q. Now, let us go on to the next item.

There is no pickup charge on the American Airlines bill, is there? A. That is right.

Q. You delivered it yourself? A. Yes.

Q. All right. There is a pickup on the Airborne bill of [937] $2, is there not? A. That is right.

Q. Because Airborne picked it up?

A. That is right.

Q. There is no delivery charge on the American Airlines bill. There originally was a $3 charge on the Airborne bill, but that has been deleted, has it not? A. That is right.

Q. Because sometimes in Dallas, you want Airborne to deliver for you, do you not? A. No.

Q. And sometimes you pick it up, do you not?

A. We pick that up always.

Q. All right. So the $3 delivery charge is out of Airborne, is it not? A. That is right.

Q. On the American Airlines bill, there is an excess value transportation charge of 10c, and on the Airborne bill, there is $6.08, is there not?

A. That is right.

Q. Because you want the protection given to you by Airborne on excess valuation, do you not?

A. We did not ask to do it.

Q. Don't you always request excess valuation?

A. No, sir, unless we tell them on the air bill that goes [938] on, we do not want them.

Q. You do not want excess value?

A. Unless we put it on ourselves.

Q. Have you got these manifests for this?

(Testimony of William Zappettini.)

A. This one here, that is the only document I have here.

Q. This shipment by Airborne was from Oakland Flower Shop? A. That is right.

Q. You know, do you, who made out the manifest?

A. The Oakland Flower Shop Company made it.

Q. And who made out the air bill?

A. They made out the air bill themselves.

Q. Who is "they"?

A. The Oakland Flower Shop.

Q. They may have requested excess value?

A. Sure.

Q. Then there is the transportation tax on the American Airlines, of $1.04, and on the Airborne of $1.70? A. Mine.

Q. Well, it is not clear.

So the total Airborne bill is $48.38, is it not?

A. That is correct.

Q. And the total charges on the American Airlines bill is $35.58, is it not? A. That is right.

Q. Because you also have there in the American Airlines bill, a Bay Area charge of $1.24?

A. That is right.

Q. Now, are those bills any comparison?

A. There is a comparison to show that you have 100 bunches of roses on both shipments, going down to Dallas from San Francisco, and the difference is that on the other end, on that one, you land for $35.58, and on the other one, the original was $81.47, and after being corrected, the bill became $48.38.

(Testimony of William Zappettini.)

Q. You do not consider, Mr. Zappettini, that the charge for air carriage on 265 pounds is $15 higher than on 181 pounds?

A. If you want to find out, why should there be the excess weight on 100 bunches of roses over such a differential that you have on those two bills there?

Q. In one case, Mr. Zappettini, I notice that the boxes are three feet, and in the other case, four feet. Is there not a difference of length?

A. There should be a little difference, but not that amount of difference. You see, the weight is exceptionally extravagant. The weight on that 100 bunches of roses is about the same, because the roses are about the same size that we ship, and there should not be any such extravagant difference.

Q. You are not contesting these weights, are you, Mr. Zappettini? A. Well—— [940]

Q. As a matter of fact, Mr. Zappettini, you do your own weighing, do you not?

A. I don't know if we do or not.

Q. Now, Mr. Zappettini, you know that the shipper weighs and the air lines and the forwarders accept your weight. You do know that, do you not?

A. I beg your pardon.

Of course, this is shipped by the other company. I do not know if they did or not. Presumably, perhaps they do.

Q. In your own case, Mr. Zappettini, don't you make your own weights up? A. We do.

Q. You do, do you not? A. Yes.

Q. And Airborne takes your weights, does it not? A. Yes.

(Testimony of William Zappettini)

Q. And the air lines take your weights when they deliver for you, do they not? A. Yes.

Q. So, on this Airborne bill, that 285 pounds was what they weighed, is it not?

And you used bills like that to make these comparisons that you have testified about?

A. I made this comparison because I thought it was large enough to haul in evidence. [941]

Q. I see. You have based your testimony on comparisons made from this particular bill?

A. No, that is just one instance.

Q. You carry insurance on your flower shipments? A. No.

Mr. Wolf: Thank you, Mr. Zappettini.

No further questions.

Examiner Walsh: Mr. Stowell?

Mr. Stowell: I have a few questions, Mr. Examiner.

Q. (By Mr. Stowell): You have been an officer with Bay Area since it was organized, have you not, Mr. Zappettini? A. Yes.

Q. During the entire time of your administration, has any application for membership ever been refused?

A. To the best of my recollection, no.

Q. Mr. Zappettini, do you know the names of the air lines which are now used by Bay Area?

A. I think I do.

Q. Would you prefer that I ask questions of Mr. Barulich?

(Testimony of William Zappettini)

A. Well, you can ask him. He knows better than I do.

Q. I have some detailed questions about the air lines used, points and routings. A. Fine.

Mr. Stowell: Mr. Gaudio, will you plan to put Mr. [942] Barulich on the stand?

Mr. Gaudio: Yes.

Mr. Stowell: I would like to ask him about this routing circular. I will defer further questions of Mr. Zappettini.

I do have one more question.

Q. (By Mr. Stowell): Do you recall, Mr. Zappettini, whether you ever signed any other routing instructions than the one which is marked for identification as BA Exhibit No. 16?

A. Yes, I believe I saw this.

Q. Can you remember whether you ever signed any other?

A. Well, to my recollection, we may have instructed our traffic manager to ship it through other air lines than this.

Q. Can you remember any specific ones?

A. No, not any one particular line.

Mr. Stowell: I have no further questions.

Examiner Walsh: Any Redirect, Mr. Gaudio?

Redirect Examination

By Mr. Gaudio:

Q. Mr. Zappettini, in your experience with Bay Area as a shipper, this question of the insurance

(Testimony of William Zappettini.)

claims, and settling of the matter through an adjuster is eliminated, is it not, or is it?

A. Yes.

Q. So you do not have any of those kinds of problems any more? [943]

A No, not with Bay Area.

Q. As you previously testified, if there is a shipment lost, damaged or destroyed, and it is nobody's fault, you are out; is that correct?

A. Correct.

Q. Did you feel obliged to pay Airborne more than $1,000 if they owed you $4,700 and some-odd dollars at that time?

A. Well, the letter shows that Airborne, we owed them for some freight, and I did mail them a check. My instruction was not to send them any money, but I did send them a check for the air freight.

Q. But, notwithstanding, during that period, they were indebted to you in the sum of $4,735.17?

A. The amount was larger than $4,000, whatever the check shows.

Q. You mean the amount of the outstanding C.O.D.'s? A. C.O.D.s and other charges.

Q. Was this figure an adjustment between what you owed Airborne and what Airborne owed you?

A. Yes.

Q. I see. All of the applications for memberships are passed upon by the Board of Directors, are they not? A. Correct. [944]

Q. In like manner, failure of a member to pay dues is reported to the Board of Directors, and he

(Testimony of William Zappettini.)

is accordingly dropped; is that correct?

A. Correct.

Q. The record shows, Mr. Zappettini, that the articles of formal incorporation in the first instance were filed with the Secretary of State on June 14, 1950, but was any time lapsed after that necessary in order to get the organization under way and functioning, do you remember?

A. Well, I think there was a certain amount of time.

Q. I meant June 14, 1949. I am sorry.

A. Yes.

Mr. Gaudio: I think that is all.

Mr. Wolf: May I ask one question, Mr. Examiner?

Examiner Walsh: Mr. Wolf.

Recross-Examination

By Mr. Wolf:

Q. Mr. Zappettini, you have finished testifying that you sent Airborne a check for these pre-payment charges which were in dispute? A. Yes.

Q. When?

A. When I received the statement.

Q. Can you produce the cancelled check?

A. Yes, it is attached on there. [945]

Q. Your check?

A. My check is attached to that, yes.

Q. Mr. Zappettini, counsel has handed me a few documents in reply to my question.

(Testimony of William Zappettini.)

I show you here a statement which apparently was attached to an Airborne check, dated July 7, 1950, on which is stated, "Final Payment covering all C.O.D.'s and Claims payable as of July 7, 1950." Check in the sum of $500.

I also show you a statement——

A. 3-15-50.

Q. I also show you a statement which was attached to an Airborne check, dated March 15, 1950, which states, "Final settlement covering all C.O.D.'s, claims due and payable as of March 15, 1950. Zappettini Company, San Francisco, Los Angeles and Dallas. $2,500."

Those two statements were received by you with the checks attached, were they not? A. Yes.

Q. So all those earlier C.O.D.'s were finally settled up, were they not? A. That is right.

Q. In round amounts? A. That is right.

Mr. Wolf: Mr. Examiner, I ask that these two statements just identified by the witness be introduce as Airborne's [946] exhibits next in order, the statement of March 15, 1950, and of July 7, 1950.

Mr. Gaudio: I have no objection to the receipt of them.

I might ask Mr. McPherson some questions in that connection, later.

Examiner Walsh: Are these Mr. Zappettini's records, or Airborne's records?

Mr. Wolf: Those were sent to you, Mr. Zappettini?

The Witness: Yes.

(Testimony of William Zappettini.)

Mr. Wolf: And these are part of your records?

The Witness: Part of our records. We record on our books those checks received.

Examiner Walsh: Do you have anything in your records——

The Witness: No, this is the only record we have.

Mr. Gaudio: Is this your document, this green document?

The Witness: That is our document.

Mr. Wolf: Mr. Zappettini just took those out of his pocket when I started examining him.

Mr. Gaudio: Yes, I know.

Examiner Walsh: These appear to be original records, and I am wondering whether he has any other record of these particular transactions, and whether he would have further need for these documents in his file?

If he has, they could be photostated, probably.

Mr. Wolf: Mr. Zappettini, do your records show that these [947] checks were entered in your books?

The Witness: I presume they were entered in the books, but that is the only record that we have physically on hand.

Examiner Walsh: Do you object to having these submitted, the originals submitted in evidence?

Mr. Gaudio: Can they be read into the record, or make whatever extracts you wish?

Mr. Wolf: Suppose I read them in full.

Examiner Walsh: Yes.

(Testimony of William Zappettini)

Mr. Wolf: Then we can give them back to Mr. Zappettini.

Examiner Walsh: That probably would be better.

Mr. Wolf: The first statement which I will read into the record is the bottom of a check which has been attached to the check by perforation. It is headed, "Airborne Flower & Freight Traffic, Inc." Over to the left, at the top, it says, "Please detach before depositing. No other receipt necessary."

To the right, at the top, it says, "When detached and paid, the above check becomes a receipt in full payment of the following account." Then there follows columns setting forth dates, names, earnings, deductions, net amounts paid.

Written across those columns, in ink, are the words: "Check No. 3911, $2,500."

Mr. Gaudio: Would that be an Airborne check, Mr. Wolf?

Is that what you are trying to establish?

Mr. Wolf: Yes. [948]

Mr. Gaudio: What would be the date of that check?

Mr. Wolf: Just below that, the date, 3-15-50, appears, and under the word "description" is written, "Final Settlement covering all C.O.D.'s, claims due and payable, as of March 15, 1950. Zappettini Company, S F, L A, and Dallas."

The second statement is in the same form, and is dated 7-7-50. In ink, under the word "description" appears "Second Final Payment covering all

(Testimony of William Zappettini)

C.O.D.'s and Claims payable as of July 7, 1950."

Those checks were received by you, Mr. Zappettini?

The Witness: Yes.

Examiner Walsh: You indicated the amounts, did you not, Mr. Wolf?

Mr. Wolf: Yes, Mr. Examiner.

Q. (By Mr. Wolf): I show you a statement of Airborne Flower & Freight Traffic, Inc., addressed to William Zappettini Company, showing a balance due of $5,169.97. There is no date on this statement.

Do you know when you got it?

A. They did not put any on at that time.

Q. You have also handed me an Airborne letter dated June 22, 1949. Was this letter and statement received together?

A. I do not think so, no. I doubt it very much.

Q. Mr. Zappettini, you have handed me a copy of a letter dated June 23, 1949, addressed to Airborne, signed by William [949] Zappettini Company, which states as follows: "Gentlemen: Enclosed herewith is our check amounting to $1,000, to be applied toward our account. We find this to be the only feasible way in which to make a payment to you, due to there being so many claims and differences in this matter.

"As soon as our bookkeeper, Mr. Bacigalupi, returns from his vacation, I will check this matter with you, in order to settle this account.

(Testimony of William Zappettini)

"Trusting you will find same in order, we are, very truly yours, William Zappettini Company."

Now, in June of 1949, you said that there were many claims and differences in this matter, and you sent a check to Airborne on account of $1,000; is that correct? A. That is correct.

Q. And were you hoping that you would be able to straighten out the rest of it in the future?

A. Correct.

Mr. Wolf: Thank you.

Examiner Walsh: Was that money due and owing Airborne on the statement of account?

Mr. Wolf: Yes.

Q. (By Mr. Wolf): Now, Mr. Zappettini, having called to your attention the fact that you sent Airborne a check for $1,000 on June 23, does this statement of $5,169.97 from Airborne to [950] William Zappettini & Company, call to your mind the fact that you received that, and then sent Airborne a check for $1,000?

A. I do not know if we did send a check for this statement here. I do not know if we did anything with it.

Q. Here is a letter of June 22 from Airborne to you——

Examiner Walsh: What year?

Mr. Wolf: 1949. (Continuing): ——which states: "As requested in our telephone conversation of yesterday, enclosed please find statements to your account. I hope that this is the information you desire. If we can be of any further service to

(Testimony of William Zappettini)

you, please do not hesitate to call on us." Signed by Airborne.

Now, with that letter, and that statement, and the fact that you sent Airborne a check within a day thereafter for $1,000, would it be your best recollection that the statement came to you with this letter of June 22, 1949?

A. I could not say about this statement. My document shows here when we mailed them the check. I think perhaps it was—this letter was the 22nd of June, 1949, and I mailed the check on June 23, the next day. But I do not know, especially in this letter here, there is no information in that, no detail on that statement.

Q. I understand, Mr. Zappettini. I call to your attention the fact that this morning you have taken from your pocket this statement from Airborne to you, the letter of June 22, 1949, your answer of June 23, 1949, with which you enclosed a [951] check to Airborne for $1,000.

Can you recall why you put this statement in your pocket with these other documents?

A. I found those documents, and I just put everything in the envelope of this one, to bring them over here. But there is nothing indicating there when that came in.

Q. This statement was, however, received by you at some time? A. Yes.

Q. And it shows that you owed Airborne $5,169.97 at some time?

A. Yes, according to that figure.

(Testimony of William Zappettini)

Q. And you have made some deductions there?

A. That is right.

Q. Now, let us see what these deductions were, from this statement. C.O.D. charges, $118.24.

A. Where is that?

Q. Right there.

A. Yes, that is subtracted from the C.O.D. up there for $1,000.

Q. That is right.

A. This was received in the meantime, in other words.

Q. Yes. And $12.22 was added back on?

A. That is right.

Q. But you cannot recollect when you got [952] this?

A. I cannot recollect when we did get that.

Q. Mr. Zappettini, can I point this out to you, that in the upper left-hand corner of the Airborne letter of June 22, 1949, and this statement, that you cannot recollect where you got, there appears to be two little holes such as are made by a stapling machine. Do you notice that? A. Yes, sir.

Q. Those two fit over each other?

A. They are right together.

Q. The statement and the claim fit together?

A. Not that I know. We had them filed together. We have a file that big.

Q. All right, Mr. Zappettini. Now, if you look closely—come here and look on with me—you will find another two holes of staples, about four inches over across the top of the letter, and these two

(Testimony of William Zappettini)

staple holes run slightly in a diagonal direction. You see those two? A. Yes.

Q. And those fit over each other, like that?

A. Yes. Our office——

Q. Just a minute. Let us see if we can find some more.

A. You can find all kinds of holes.

Q. Just a little bit below, and about an inch and a half from the left side of the letter, are two more staple holes set close together, running on a diagonal, and the staple holes [953] appear——

A. Let me examine this.

Q. You examine it very carefully.

A. You got all kinds of holes in that.

Q. But those three sets of staple holes that I have just pointed out to you——

A. That holds those two pieces of paper together.

Q. I see. And when were they clipped together?

A. They might have been clipped half a dozen times together. As I recall, we had to go into this with Mr. Airborne a hundred times over those previous invoices, and the statement, and irregularities that we had, and we had a statement mailed to us from time to time. We pulled them apart half a dozen times, those pieces of paper, and put them together half a dozen times, again, in order to keep the record.

Q. I understand, Mr. Zappettini. I am simply trying to examine these documents, and simply trying to have you look at these. After examining

(Testimony of William Zappettini)
the punctured holes, wouldn't you now say that the letter and the statement came at the same time?

A. I could not say.

Mr. Wolf: If the Examiner please, I think that from the testimony that has been adduced here, there would be a fair inference drawn——

Mr. Gaudio: We can argue it later.

Examiner Walsh: Do you want to introduce that? [954]

Mr. Wolf: I will introduce this as one exhibit, with "A" and "B" after the number.

Examiner Walsh: We will identify this as Airborne's Exhibit No. 8.

The undated statement made from Airborne to William Zappettini Company, is marked for identification as Airborne's Exhibit No. 8-A, and the letter from Airborne to William Zappettini Company, of June 22, 1949, is marked for identification as Airborne's Exhibit No. 8-B.

(The documents above referred to were marked for identification as Airborne's Exhibits Nos. 8-A and 8-B.)

Q. (By Mr. Wolf): Do you recall, Mr. Zappettini, that the settlement of the C.O.D.'s and the insurance company claim, and the freight charges owing by you to Airborne, were delayed very many months? There was a long delay until everything was settled up?

A. The claim naturally was delayed, that I know.

(Testimony of William Zappettini)

Q. That is right. Do you recall that your bookkeeper, Mr. Bacigalupi, asked that it be delayed?

A. The claim?

Q. The settlement, the final settlement.

A. I do not think he wanted it delayed. He was very much in favor of the settlement. [955]

Q. You do not remember that?

A. I do not remember. He was very anxious. You can see by our letters, the correspondence, that we tried to get a settlement as soon as possible.

Mr. Wolf: That is all, Mr. Zappettini.

Examiner Walsh: Mr. Stowell?

Mr. Stowell: No questions.

Examiner Walsh: Mr. Gaudio?

Redirect Examination

By Mr. Gaudio:

Q. Mr. Zappettini, according to the stamp from your office, this letter from Airborne, Exhibit 8-B for identification, was received in your office on June 22, 1949; is that right?

A. That is correct.

Q. But later for C.O.D.'s dating from May 1, 1951, until May 31, 1951, there was a further accumulation of C.O.D.'s, totaling $4,536.17, as demonstrated on BA Exhibit No. 15; is that correct?

A. That is correct.

Q. And according to the attachment to BA Exhibit No. 15, you wrote once on June 7th, making a demand for payment, and another time on June 8th; is that correct? A. That is correct.

(Testimony of William Zappettini)

Q. Correction on that. Your original inquiry was dated [956] June 7, but issued on June 8, as indicated on this exhibit. These sums in addition, then, to whatever accountings are indicated in BA Exhibit 8-A?

A. Their statement has no way to indicate just what that is. It shows numbers, but it has no detail, and does not refer to any particular date and time.

Mr. Gaudio: That is all.

Mr. Wolf: No further questions.

Examiner Walsh: If there are no further questions of Mr. Zappettini, he may be excused.

(Witness excused.)

Examiner Walsh: We will take a 5-minute recess.

Mr. Gaudio: May we first ask that the exhibits that have been identified be received at this time?

Examiner Walsh: Bay Area's Exhibits Nos. 13 through 17 have been offered in evidence. Are there any objections? Hearing none, they are received.

(The documents marked as Bay Area's Exhibits Nos. 13 through 17, inclusive, were received in evidence.)

Examiner Walsh: Now, would you like to move yours, Mr. Wolf?

Mr. Wolf: I offer Airborne's Exhibits 8-A and 8-B in evidence.

Examiner Walsh: Any objection?

Mr. Gaudio: No objection. [957]

Examiner Walsh: Airborne's Exhibits 8-A and 8-B will be received in evidence.

(The documents marked as Airborne's Exhibits Nos. 8-A and 8-B were received in evidence.)

Examiner Walsh: We will take a short recess.

(Short recess taken.)

Examiner Walsh: Come to order, gentlemen.

Mr. Gaudio: At this time I would like to call Mr. Bonaccorsi.

Whereupon,

JAMES F. BONACCORSI

recalled as a witness for and on behalf of Bay Area, having been previously sworn, was examined and testified further as follows:

Direct Examination

By Mr. Gaudio:

Q. Mr. Bonaccorsi, you recall the discussion in connection with Bay Area's Exhibit No. 12 regarding the disparity of charges? A. Yes.

Q. I show you these two documents, and ask if they represent shipments in your behalf?

A. Yes, they do.

Q. Are they identical shipments to the same consignee?

A. Yes, they are identical shipments to the same consignee, [958] within a few days apart.

Q. What were the charges?

A. The charges on one were $15.48, and the other was $23.09.

(Testimony of James F. Bonaccorsi.)

Q. What type of shipments, dimensional or actual weight, were they?

A. On each one, there were two boxes, dimensions 13 by 17 by 11, cut flowers, actual weight 36. And the same dimensional weight, 38, a few days later.

Q. What is the approximate difference between the two charges? A. About $5, I presume.

Q. Is that an isolated instance in your case?

A. No.

Mr. Wolf: Just a minute, Mr. Examiner. I make the same objection, that we are trying to confine comparisons as of the date of forming Bay Area.

Mr. Gaudio: We are not making comparisons. This is not for the purpose of making comparisons. These are both Airborne shipments, are they not, Mr. Bonaccorsi?

The Witness: Yes, they are.

Q. (By Mr. Gaudio): In this item of identical shipments going to identical consignees, there was an element of consideration in forming Bay [959] Area? A. Definitely was.

Q. As a member shipper and director of Bay Area, have you found that the measure of control which you as a shipper exercise through the Executive Secretary, has eliminated this question of diversity for the same type of shipment?

A. It certainly has.

Mr. Gaudio: You may cross-examine.

Examiner Walsh: Cross-examination, Mr. Wolf?

(Testimony of James F. Bonaccorsi.)

Do you intend to have these marked for identification and offered in evidence, Mr. Gaudio?

Mr. Gaudio: Not particularly. I just wanted the classifications.

Q. (By Mr. Gaudio): One further question, in that connection, Mr. Bonaccorsi. On these bills, identical items are covered, and rates projected for the service rendered, on each shipment. In other words, each shipment shows a direct charge plus pickup, and compilation?

A. At least it is printed in the invoice manifest, but on these particular ones, there is no pickup charge shown there.

Mr. Wolf: Mr. Gaudio, have you finished?

Mr. Gaudio: Yes.

Cross-Examination

By Mr. Wolf:

Q. Mr. Bonaccorsi, with the same dimensional weight in [960] here, the same number of boxes, same size, same everything, it is pretty obvious that one of these air bills is wrong?

A. It is obvious that something is wrong, yes.

Q. Do you remember whether a claim was made against you to make up a deficiency, or did you receive a check back for an overcharge on either of these?

A. No, I do not remember of anything.

Q. You do not remember?

A. In fact, this happened purely by accident. I happened to bring some manifests, and I was

(Testimony of James F. Bonaccorsi.)

going through them, and I just noticed that today.

Q. I would advise you, Mr. Bonaccorsi, to file a claim on one of these, if the overcharge is present.

A. Thank you.

Mr. Wolf: They are dated January, 1952.

No further questions.

Examiner Walsh: Mr. Stowell?

Mr. Stowell: No questions.

Mr. Gaudio: That is all, Mr. Bonaccorsi. Thank you.

Examiner Walsh: Thank you.

(Witness excused.) [961]

* * *

JAMES F. BONACCORSI

recalled as a witness for and on behalf of Bay Area, having been previously sworn, was examined and testified as follows:

Direct Examination

By Mr. Gaudio:

Q. Mr. Bonaccorsi, you were a director in the early part of 1950 of Bay Area?

A. Yes. [1094]

Q. Do you recall attending a meeting of the Board of Directors during April or May of 1950, at which a letter from Mr. McPherson, addressed to Mr. Zappettini as president, was discussed?

A. Yes, I was.

Q. Who was present at that meeting?

(Testimony of James F. Bonaccorsi.)

A. All the board members were present at that time.

Q. Was Mr. McPherson there?

A. Mr. McPherson was not there when the letter was brought to the attention of the board members, but at that particular meeting it was discussed that we invite Mr. McPherson to a meeting for the purpose of finding out just what he had in mind.

Q. And did he attend a later meeting?

A. He did. I think a week later.

Q. And the board members were present?

A. That is correct.

Q. You were present? A. Yes.

Q. What did Mr. McPherson state to the Board of Directors at that time?

A. In the letter he suggested that if all the florists would ship together all their shipments, pool all their shipments, that they could get a cheaper rate by consolidating.

In other words, with more flowers they could carry a lower rate. And I asked Mr. McPherson a question at that time, if all [1095] the present people who are shipping through him could become members of Bay Area, and ship all the flowers through Bay Area, if he would object to it at that time. And he said he did not, because the purpose was that he was to act as Agent for the floral industry, with the understanding, of course, that we would have a traffic manager supervising the floral industry, in other words, looking out for the florists.

(Testimony of James F. Bonaccorsi.)

Q. Were those conditions acceptable to you and the other members of the board, provided they were met? A. Provided they were met, yes.

Q. And at a subsequent date, did you discover that that was not Mr. McPherson's intentions at all? A. I did.

Q. And was that a motivating factor in your and Mr. Zappettini's decision to withdraw from the organization? A. Yes.

Mr. Gaudio: That is all.

Examiner Walsh: Mr. Wolf.

Cross-Examination

By Mr. Wolf:

Q. Mr. Bonaccorsi, in answer to the last question, you stated something about that was not Mr. McPherson's intentions. Could you clarify that statement?

A. Well, if a person tells me one thing and means something else—— [1096]

Q. Just a minute. What were Mr. McPherson's intentions that you discovered?

Mr. Gaudio: Just a moment, Mr. Bonaccorsi. I will object to the question as calling for the witness' conclusion.

I have no objection to Mr. Bonaccorsi stating in so many words what Mr. McPherson told him and the group.

We will let the Examiner determine what his intentions were, from those statements.

(Testimony of James F. Bonaccorsi.)

Mr. Wolf: In answer to your last question, Mr. Gaudio, Mr. Bonaccorsi said that he discovered that that was not Mr. McPherson's intentions. Now, I want to find out——

Mr. Gaudio: On what he bases that statement?

Mr. Wolf: What were these intentions, yes.

The Witness: I was told, as I previously testified, that at this particular meeting, Mr. McPherson was going to agree to these questions that I brought out. He agreed to do certain things.

During the course of our negotiations, as we went along, each time we went deeper, we would get sidetracked. First it was supposed to be Bay Area that was supposed to be the group that the shipments were going through; then it was decided no, we were going to form another association. I do not say that Mr. McPherson himself came out about forming this new association. Perhaps he had nothing to do with it. I would not say that.

But at one time, in one of the meetings which Mr. McPherson [1097] attended, there he said there was no need for a traffic manager. He decided that he would joint load with whom he pleased. In other words, our member growers.

When those things came about, I began to see—well, we just threw up our hands. Anyway, he gave me enough evidence that he was not adhering to what he agreed to do. All I was interested in was to have an industry movement that would benefit the industry, for the good of the industry, and we were not getting it through Mr. McPherson.

(Testimony of James F. Bonaccorsi.)

Q. Mr. Bonaccorsi, you were not shipping by Mr. McPherson at that time, were you?

A. I think I was shipping something through him, yes.

Q. But you were not shipping in consolidation through him, were you?

A. That I do not know.

Q. You do not know?

A. That is correct, I do not know.

Q. You were a member of the Bay Area consolidation, were you not? A. That is correct.

Q. So your consolidated shipments went out by Bay Area, did they not?

A. Some of them, as I heard today——

Q. I am not asking about those. I am asking about your shipments, Mr. Bonaccorsi. [1098]

A. If my shipments——

Q. Did your shipments go out by consolidation other than Bay Area consolidation during this period you are speaking of?

A. I believe there was a two-weeks period where all my shipments, all my air shipments, were tendered to Airborne, where they were supposed to have gone out on consolidation.

Q. The original plan you have stated was discussed by your members as proposed by Mr. McPherson, involved generally speaking, cheaper rates on flower shipments; is that correct?

A. You are referring to the letter? Yes.

Q. That is the first meeting you are talking

(Testimony of James F. Bonaccorsi.)

about, now? A. That is correct.

Q. And was there any indication by Mr. McPherson at any later date, that if the plan had been followed out, the flowers would not have gone on cheaper rates?

Mr. Gaudio: I submit, Mr. Examiner, we are indulging in speculation now. We are talking about something that might have occurred if the organization had gone forward.

Mr. Wolf: I will withdraw that question. It is a little bit hypothetical.

Q. (By Mr. Wolf): Did Mr. McPherson indicate at a time subsequent to this first meeting where he was present, that you would not receive cheaper rates on flower shipments?

A. Yes. In one instance, I brought it our earlier in [1099] the testimony, when I asked Mr. McPherson if he joint-loaded the members' shipments with E. W. McClellan & Company, would the members get the same rate as McClellan would, and his answer was no. So I believe that answers your question.

Mr. Wolf: Thank you, Mr. Bonaccorsi.

Mr. Stowell: No questions.

Examiner Walsh: Mr. Gaudio?

Redirect Examinaton

By Mr. Gaudio:

Q. That two-week period that you refer to was the two-week period when Reynolds had removed

(Testimony of James F. Bonaccorsi.)

his trucks from Bay Area's service; is that not correct? A. That is correct.

Mr. Gaudio: That is all.

Examiner Walsh: Are there any more questions of Mr. Bonaccorsi?

Mr. Wolf: Yes.

Recross-Examination

By Mr. Wolf:

Q. We are talking about these Reynolds trucks. Do you know how many trucks Reynolds sold to Airborne? A. One truck, I believe.

Q. One truck? Do you remember the date of the sale? A. No, I do not, not the exact date.

Q. Do you remember that it was August 24, 1950? [1100]

Mr. Gaudio: Just a moment.

Mr. Examiner, I merely wanted to clarify that two-week period when Reynolds' trucks were removed from the service of Bay Area. I made no reference to a sale, and the record is clear already by other witnesses as to the date of the sale, and what was sold.

I object to the question as improper Redirect or Recross.

Examiner Walsh: I believe that is correct.

Mr. Wolf: I asked a question, Mr. Examiner. What was the ruling on it?

I asked if Mr. Bonaccorsi knew that the date of sale of one truck was August 24, 1950.

(Testimony of James F. Bonaccorsi.)

Mr. Gaudio: I object to the question as improper Recross.

Examiner Walsh: I believe he testified he could not remember.

The Witness: I do not remember, not the exact date.

Mr. Wolf: You do not remember?

The Witness: Not the exact date.

Mr. Wolf: Nothing further. Thank you.

(Witness excused.) [1101]

* * *

ALFRED G. ENOCH

was recalled as a witness for and on behalf of Bay Area, and having been previously sworn, was examined and testified further as follows:

Direct Examination

By Mr. Gaudio:

Q. Mr. Enoch, early in 1949, were you handling your shipments direct with the air lines to eastern destination stations?

A. Yes, most of them.

Q. I show you two air bills, and attached documents, in the form of consolidation manifests, and ask you if these two documents, one with the Flying Tiger Lines, Inc., and another, Slick Airways, Inc., are shipments which you handled at that time?

A. Yes, that is right.

Q. Now, the Flying Tiger shipments, dated

(Testimony of Alfred G. Enoch.)

March 26, 1949, and the other, dated March 24, 1949, all of this method of [1113] operation on your part was prior to any organization now known as Bay Area? A. That is right.

Q. Will you briefly describe how you arranged for the handling of your shipments on each of those instances?

A. You mean how did I arrange for consolidation, or how did I do the shipping?

Q. How did you do the shipping and arrange for the consolidation?

A. Through the air lines. I cannot tell who or where or what, but I found out about this prepaid, or even collect distribution, and so on my own initiative, I started grouping my shipments. For instance, if we had Cleveland, instead of shipping them four times a week, we would cut it down to three times a week, shipping into Cleveland, or maybe even two times a week, so as to give us a larger volume, so we could get into a higher weight bracket.

And we would consolidate our own shipments. We would take a lot of them to the airport. We had a lot of them hauled to the airport, and the airlines charged us 25c for each shipment, for distribution charge. And then the total cost would be on these particular ones. We had them delivered to the airport, paid therefor a truckage company to haul them. They were taken from our place of business to the airport, and transported to Cleveland on one,

(Testimony of Alfred G. Enoch.)

Chicago on the other, and this included the [1114] cost of distribution, which meant delivery downtown; or also delivery to the surface carrier.

Q. Transfers?

A. Transfers. And there is no arrangement to it. Slick had their own assembly or distribution manifests that we used.

On the Tiger one, we used our own mimeographed form that we ourselves made.

Q. Will you just state for the record what your average per box developed to be on the Slick Airways shipment?

A. On the Slick Airways shipment, it was approximately $4.47 a box, and on the Flying Tiger, it was $4.85 a box to Cleveland. The Slick one was to Chicago.

Q. Now, turning to the consolidation sheets, on each of these representative transactions, in the event there is a single box going to an ultimate consignee, as demonstrated on the consolidation sheet, what has your experience been, if any, via a common carrier service such as Arborne has, in the cost per box in such instances?

Mr. Wolf: Just a minute.

Mr. Examiner, I would like this related in point of time.

Mr. Gaudio: Very well.

Q. (By Mr. Gaudio): During, at, or about the time when these shipments were taken?

A. I think I can answer to that, that practically ever [115] since I have been in season, outside of the

(Testimony of Alfred G. Enoch.)

first start of the season when the flowers are high, it is almost impossible to ship a single box through any carrier.

Q. In other words, your experience as demonstrated by these exhibits, impelled, insofar as your business is concerned, the need for larger shipments? A. That is right.

Q. And the larger the shipment, the lesser cost to you, and the more profit in your consignment sales; is that correct? A. That is right.

Q. Was it your inquiry as a consequence of this disclosure as to the cost of transportation that invited your attention to the organization of a group such as Bay Area is?

A. Yes. It first started as a group—American Airlines first started their air freighter.

Q. That purpose was even more apparent when collect distribution was discontinued; is that right?

A. Oh, definitely.

Mr. Gaudio: May we offer these as respondent's exhibits next in order, for the record at this time?

Examiner Walsh: The air bill of Slick Airways, and attached manifest, will be marked for identification as Bay Area's Exhibit No. 27.

You are offering it at this time, are you?

Mr. Gaudio: Yes. [1116]

Examiner Walsh: Any objection?

Mr. Wolf: No objection.

Examiner Walsh: Hearing none, Bay Area's Exhibit 27 is received.

(The document above referred to was marked

(Testimony of Alfred G. Enoch.)

for identification as Bay Area's Exhibit No. 27, and was received in evidence.)

Examiner Walsh: The air bill of the Flying Tiger Line, and attached manifest, marked for identification as Bay Area's Exhibit No. 28, is received in evidence without objection.

(The document above referred to was marked for identification as Bay Area's Exhibit No. 28, and was received in evidence.)

Mr. Gaudio: I have no further questions of Mr. Enoch.

Examiner Walsh: Mr. Wolf.

Cross-Examination

By Mr. Wolf:

Q. Mr. Enoch, you stated that when collect distribution or prepaid distribution, as the case may be, went out of the picture, that you felt more than ever the need for the Bay Area service; is that correct? A. That is correct.

Q. Do you know when collect distribution was declared invalid by the Civil Aeronautics Board?

A. No, I do not believe I could give you the date. [1117]

Mr. Wolf: Will you stipulate on that date, counsel?

Mr. Gaudio: I do not know the date, but if you will tell me, I will stipulate it.

Mr. Stowell: I will say that in December of

(Testimony of Alfred G. Enoch.)

1950, the board issued its final opinion in a case of the investigation of accumulation, assembly and distribution rules, Dockets 1705, et al., which were decided September 14 and December 20, 1950, the former being the tentative opinion, and the latter being the final opinion of the board. And that opinion required the carriers, if they desired to have a distribution service, that it must be on a prepaid basis.

Mr. Wolf: Mr. Enoch, I will call your attention, for instance, to the Flying Tiger Line air bill with manifest attached. I notice that there were 25 boxes in that shipment. The original destination point was Cleveland, and from there, a certain number of boxes went to Boston, Youngstown, Buffalo, Canton, Pittsburgh, and the remainder of the boxes were dropped off at Cleveland. Is that right?

The Witness: That is right.

Q. (By Mr. Wolf): Now, when you made a shipment such as this one, it went as one shipment, so far as you were concerned, did it not?

A. As far as I was concerned.

Q. And there was no charge against you for cutting new air bills at Cleveland? [1118]

A. The only charge was distribution charge.

Q. Of $2.50 on this particular one?

A. 25c a shipment, regardless of boxes.

Q. This was without any delivery charge other than that?

A. Well, distribution charge is on that end, is it not?

(Testimony of Alfred G. Enoch.)

Q. Do you not recall that on shipments such as this, that the distribution would be made by a local trucker and arranged for by the air line?

A. Not to my knowledge, in any way whatsoever.

Q. When Bay Area came into existence, there is a delivery charge, is there not, at the far end?

A. That is right.

Q. I call your attention to the Slick Airways air bill and the manifest covering 11 boxes of decorative greens, and numerous cities are mentioned there—St. Paul, Columbus, Milwaukee, Columbus, Indianapolis, and Chicago. So far as you were concerned, that went as one shipment?

A. That is right.

Q. And the air lines did the entire performance from the time you handed it to them; is that correct?

A. This air line calls it "consolidation charge."

Q. Of 25c per box? A. Per shipment.

Q. How about a delivery charge at the other end?

A. I prepaid, and that is the bill they presented to me, [1119] and they never gave me another bill, so that must have been all.

Q. I see. What is this item, "advance charges, $5.67, R.B."

A. These particular boxes were hauled by a trucking company, namely, Reynolds Brothers.

Q. I see. That would be a pickup charge?

A. On this end, that is correct.

(Testimony of Alfred G. Enoch.)

Q. And that type of service did not go out until December of 1950; is that correct?

A. I cannot say that that is even when it went out. They may have put it out on the first—you gave two dates, September and December—it could have gone out on either date, I do not know.

Q. If in this case of Cleveland—well, as a matter of fact, there appears to be, here on this Cleveland shipment, a certain number of boxes, 10 of them, which were to be delivered in Cleveland. Was there any delivery charge on those local deliveries?

A. I was forwarded no other bills. It says here "This is your invoice," and gives total charges, and that is it.

Q. So that is all that was paid for these shipments; is that correct?

A. As far as I know, yes.

Q. Now, when Bay Area came into existence, there is a delivery charge, is there not, Mr. [1120] Enoch? A. That is right.

Mr. Wolf: Thank you.

The Witness: But it is offset by our larger volume of weight.

Mr. Wolf: Thank you, Mr. Enoch.

Mr. Gaudio: Just one closing question, Mr. Enoch.

Redirect Examination

By Mr. Gaudio:

Q. For the period that collect distribution was in effect, during Bay Area's initial period—that is,

(Testimony of Alfred G. Enoch.)

from 1949 through December of 1950—the service you have just described, which was handled on your own initiative, was also available for you through Bay Area in the larger consolidations, was it not?

A. That is right. We did use it on certain air lines.

Mr. Gaudio: That is all.

Examiner Walsh: No further questions?

Mr. Wolf: No questions.

Examiner Walsh: You may be excused, Mr. Enoch.

(Witness excused.) [1121]

[Endorsed]: No. 13727. United States Court of Appeals for the Ninth Circuit. Consolidated Flower Shipments, Inc.-Bay Area, Petitioner, vs. Civil Aeronautics Board and Airborne Flower and Freight Traffic, Inc., Respondents. Transcript of the Record. Petition to Review an Order of the Civil Aeronautics Board.

Filed May 18, 1953.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

No. 13,727

United States Court of Appeals
For the Ninth Circuit

CONSOLIDATED FLOWER SHIPMENTS, INC.—BAY AREA,

Petitioner,

vs.

CIVIL AERONAUTICS BOARD and AIRBORNE FLOWER AND FREIGHT TRAFFIC, INC.,

Respondents.

BRIEF IN BEHALF OF PETITIONER.

ANTONIO J. GAUDIO,
305 Linden Avenue, South San Francisco, California,
Attorney for Petitioner.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Cases

Statutes

No. 13,727

United States Court of Appeals
For the Ninth Circuit

CONSOLIDATED FLOWER SHIPMENTS, INC.—BAY AREA,
Petitioner,

vs.

CIVIL AERONAUTICS BOARD and AIRBORNE FLOWER AND FREIGHT TRAFFIC, INC.,
Respondents.

BRIEF IN BEHALF OF PETITIONER.

OPENING STATEMENT.

In this petition for review and in these review proceedings, petitioner has no quarrel with the findings of the Board that in so far as the physical aspects of the operations and services formed by Bay Area in behalf of its members, in assembling and consolidating their shipments, and arranging for the transportation thereof by air and arranging for the ultimate distribution to consignees of the members of Bay Area, the operations are not unlike those usually performed by common carrier air freight forwarders.

Petitioner, both before the Board and in these proceedings, contends that neither Consolidated Flower

Shipments, Inc.—Bay Area, herein referred to as Bay Area, nor its officers, agents and representatives, acting in pursuance of the corporate authority, are common carriers, either directly or indirectly, as defined in the Act, or as that term has been defined by our administrative bodies and interpreted and construed by our courts of law.

In this view, it is conceded that the Civil Aeronautics Board has jurisdiction, acting upon its own initiative, and pursuant to the authority vested in it by the Civil Aeronautics Act of 1938, as amended, particularly § 205(a), 401(a), 1002(b) and 1002(c), to order, conduct and conclude an investigation, pursuant to its order of investigation No. E5264, in Docket No. 4902, dated April 9, 1951 (TR p. 3).

The basis of jurisdiction of this Court is to be found in the provisions of § 106(a) and (b) of the Civil Aeronautics Act, 52 Stat. 973, 49 U.S.C. 401.

These provisions of the Act provide in part that any order issued by the Board, such as the order under review, shall be subject to review by the Circuit Court of Appeals for the Circuit where petitioner resides or has its principal place of business.

Petitioner is a California corporation, incorporated initially under the Corporations Code of the State of California, and, during the conduct of these proceedings before the Board, on October 17, 1952, reincorporated as a nonprofit cooperative association under the provisions of the Agricultural Code of the State of California, § 1190 et seq.

By order of December 29, 1951, a complaint, Docket No. 5187, by Airborne Flower and Freight Traffic, Inc., was consolidated for hearing and decision in Docket No. 4902. On this score, Airborne Flower and Freight Traffic, Inc. have likewise been named as respondents in these review proceedings. However, in so doing petitioner merely followed the established practice of naming as respondents all parties of interest in the proceedings before the Board whose decision is under review. It is notable that nowhere in the opinion or order E7139 of February 5, 1953, is there any reference to any conclusion or relief granted pursuant to such complaint and no review on such complaint is sought here by this petitioner.

It should be noted from the order of investigation (TR p. 3), and the notice of hearing (TR p. 6), two fundamental issues or questions were raised, namely, (1) to determine whether Bay Area *has engaged or is engaging* indirectly in air transportation in violation of the provisions of the Act, particularly § 401(a) thereof, or part 296 of the Board's Economic Regulations thereunder, and (2) whether the Board should issue any order of cease and desist from any such violation. We make mention of the basic issues on the order of investigation for the reason that the same will bear materially not only on the jurisdiction of the Board over Bay Area's operations, but also in the matter of the exercise of a sound discretion in the light of the record thus developed and the points and arguments hereinafter mentioned.

STATEMENT OF THE CASE AND QUESTIONS INVOLVED ON REVIEW.

Prior to October 17, 1952, a date more specifically defined hereinafter, Bay Area was an association of growers and shippers of flowers and decorative greens, duly incorporated under the Corporations Code of the State of California, as a nonprofit association for the declared purpose in its articles (exhibits EA386, 766 and BA10) of performing a service for its members in the distribution and sale of their produce or products on the open market, in so-called eastern destination territory and in consequence of their marketing operations, move such commodity by air carrier and surface carriers to their ultimate consignee-purchasers.

This service so performed in behalf of Bay Area members, requires the assembly and consolidation and movement of such shipments in behalf of its members; the arranging for transportation by air, as well as surface carriers; and providing in their behalf, through Bay Area contract agents or local draymen, for the performance of break bulk and distribution to the respective ultimate consignee-purchaser of the shipments involved.

Bay Area does not publish any tariff, from which rates, as that term is usually applied, are projected or assessed. As indicated by the various shipping documents which exemplify this phase of the operation, the only charges assessed to the consignee or purchaser of Bay Area members, are the direct air carrier

charges, including the charges of pick-up or delivering contract draymen, or agent, plus a so-called "Bay Area advance charge" established at the time of the hearing at sixty (60) cents per box. Fifty-five (55) cents of this charge is paid by Bay Area to Airport Drayage (John C. Barulich, sole proprietor), who picks up the boxes at the members' nursery, greenhouse or shipping department and transports them by truck to the airport and terminal facility at San Francisco. Shipping documents in the name of Bay Area as consignor are prepared by office personnel employed in behalf of Bay Area under the supervision of Mr. Barulich as Executive Secretary of Bay Area.

Such shipments may move as so-called straight shipments in the name of the member of Bay Area, prepaid or collect. Depending upon marketing conditions then prevailing, and the volume of shipments available in the pool of the Bay Area membership, shipments may be consolidated into a single shipment, consigned to Bay Area's agent in destination territory, who breaks bulk and distributes to the ultimate consignee-purchasers, according to the instructions on the manifest or shipping document, prepared as aforesaid. The advance charge, based upon the number of boxes on the particular shipment for the purpose hereinabove set forth, is added to the total air transportation charges and either paid singly, in the case of an individual receiver, or pro rated according to the number of boxes delivered to each consignee-purchaser in the consolidated shipment.

A majority of the consolidated shipments (established as in excess of 68%—Bay Area Exhibit 18), move on consignment sales basis, between the Bay Area member and his receiver or purchaser, who charges back the transportation costs to him of the particular shipment by deducting such charges from the amount of the gross sales accomplished by him on the consignment. In such cases, in the last analysis, the Bay Area membership bears the transportation costs.

In the case of straight shipments in the name of the Bay Area member, consigned to the individual receiver or purchaser on a consignment basis, the member shipper again bears the transportation costs through appropriate invoices between himself and the purchaser consignee. In the few instances where straight sales are involved, F.O.B. San Francisco, the receiver bears all transportation charges including the above mentioned Bay Area advance charge.

As of the date of the hearing, approximately 750 such receivers were on the Bay Area members customer list throughout the area of this operation, which would be anywhere where served by air carriers with San Francisco Municipal Airport as origin point.

Since its initial organization, Bay Area has had from 19 to 26 members as of the date of the hearing, situated on the San Francisco Peninsula and its environs. Until the latter part of 1951, membership was conditioned upon approval and acceptance only by the Board of Directors, whether they shipped via Bay

Area or not (TR pp. 298, 243-244). At no time has the tender of any shipment or amount of shipments been made a condition precedent to initial membership or the *continued enjoyment of membership privileges* (TR pp. 297-298).

On October 17, 1952, during the pendency of the proceedings before the Board and prior to oral argument, Bay Area was reincorporated under the nonprofit cooperative association act of the State of California, pursuant to § 1190 et seq. of the California Agricultural Code. The essential distinction between such an association and the form under which Bay Area was incorporated during the conduct of the proceedings below, is, that the cooperative association is limited in its membership to producers of horticultural or farm products, such as flowers or decorative greens.

In point of time, the legal effect of such an organization, under the Agricultural Code, could not have been properly developed at the intitial hearing in this proceeding. The fact of the reorganization however, was reported to the Board at the oral argument, and more specifically was encompassed in the petition for reconsideration and rehearing and for stay of the effective date of order No. E7139, under review.

It was clearly established by testimony of the member shippers and officers and directors of Bay Area, including the other individual witnesses called by the Enforcement Attorney, that the purpose of organizing the association in the first instance was to procure a specialized truck service for the handling

of a highly perishable agricultural or horticultural commodity, such as cut flowers and decorative greens (TR p. 209), and to effect savings and economies in the cost of the transportation (TR p. 256) and to afford a more closely coordinated operation between the member shipper and the transportation agency in the handling of a highly perishable commodity such as flowers and decorative greens (TR pp. 238-290).

The operation and service is available only to members in good standing, who have qualified for membership pursuant to the Articles of Incorporation and By-Laws. Mr. Bonaccorsi, the President of Bay Area, established that the cost of the transportation has a direct bearing on the flower growing industry and that high transportation costs could drive the flower growing industry in this area out of business in so far as eastern destination territory is concerned. (TR Vol. II pp. 452-457.)

Each of the witnesses testifying in behalf of the petitioners clearly demonstrates the need for the cooperative effort in the handling of a perishable commodity, such as flowers and decorative greens, that the cost of the transportation oftentimes and for the most part determines the difference between profit and loss on the sale of these products, and that all of the members subscribe to and abide by the directions of the officers and directors which they elect to office in the Bay Area association.

It should be noted at this point that the Bay Area membership represents but a small fraction of the

total number of shippers of flowers and decorative greens in the San Francisco Bay Area.

Each member shipper assumes the risk of loss in so far as damage to his particular shipments are concerned, although the Bay Area association may assist the member in processing claims for loss and damage against direct carriers and surface carriers on the particular shipment. (Witness Zappettini, TR Vol. II pp. 504-505.)

Following the conclusion of the proceedings before the Board, Order No. E7139, in Docket No. 4902, dated February 5, 1953, the order under review was issued.

On the same day, in Docket No. 5947, the Board issued an order of investigation, Order No. 7141 (TR p. 406), to investigate the matter of renewal of part 296 of the Economic Regulations and to investigate generally the matter of indirect carriage of property. It will be seen from a reading of the order of investigation, E7141, that the status of a nonprofit cooperative association of flower shippers and growers such as Bay Area, is one of the issues under investigation, and that petitioners herein, as well as ten other shippers' associations were named as respondents in said proceeding, Docket No. 5947, which is now pending before the Board.

Also, on the same day, February 5, 1953, in Docket No. 5037, Order No. E7140 (TR p. 390) a then pending application for exemption in behalf of the petitioner herein, *was denied without prejudice* to the renewal

of such application for exemption in the investigation proceedings, Docket No. 5947. A reading of Order No. E7140, demonstrates again that Bay Area's status, either as an exempt operation within the Board's jurisdiction, or as a nonprofit shippers' association, will be considered by the Board in connection with its determination, in Docket No. 5947.

Following the issuance of the cease and desist order under review, petitioners' petition for reconsideration, rehearing or reargument and petition for stay of the effective date of order under review, pending a rehearing or reargument, or until conclusion of investigation in Docket No. 5947 above mentioned, or until the final disposition of said application for an exemption order, filed by the petitioners in said investigation, was, by order No. E7269 (TR p. 396, et seq.), denied without further hearing.

The question involved on this review is whether under the Civil Aeronautics Act the Board has any jurisdiction over the operations of petitioners as a nonprofit cooperative association of flower growers and shippers or as a nonprofit shippers' association.

In short, is Bay Area an indirect air carrier, as defined in § 1(2) of the Act, within the meaning of § 1 (20 and 21) of the Act?

Read together, these provisions provide, in effect, that an indirect carrier, engaging in air transportation, i.e., the carriage of property for compensation or hire as a common carrier, is subject to the jurisdiction of the Board.

This brings us to a consideration of petitioner's points of review (TR p. 425) which, in effect, goes to the question of the Board's jurisdiction over an operation such as has been demonstrated in this record.

Further question is raised on this petition as to the validity of the cease and desist order, E7139, as lacking in specificity in failing to define or designate the alleged acts, conduct and practices which the Board would have petitioner cease and desist from doing.

The concluding point or question involved is the abuse of the discretion of the Board under §1005(d) of the Act in denying rehearing or reargument and failing to stay the effective date of the cease and desist order pending the conclusion of the investigation in the renewal of part 296 in Docket No. 4947 and the conclusion of petitioner's application for exemption filed and to be heard therein.

SPECIFICATIONS OF ERROR.

I. The findings and conclusions of the Board that Bay Area has held itself out and continues to hold itself out to the public as a common carrier for compensation or hire and is an air carrier, as defined in § 1(2) of the Act, and is engaged indirectly in the transportation of property by air, are erroneous.

II. The order of the Board, dated February 5, 1953, Order E7139 is void for uncertainty in that it is not definitive of the acts, conduct and practices allegedly investing common carrier status on petitioner.

III. The respondent Board abused its discretion under § 1005(d) of the Act in failing, neglecting or refusing to stay its order under review during the pendency of an investigation in the renewal of part 296 of its Economic Regulations, assigned Docket No. 5947.

ARGUMENT AND AUTHORITY.

I. THE FINDINGS AND CONCLUSIONS OF THE BOARD THAT BAY AREA HAS HELD ITSELF OUT AND CONTINUES TO HOLD ITSELF OUT TO THE PUBLIC AS A COMMON CARRIER FOR COMPENSATION OR HIRE AND IS AN AIR CARRIER, AS DEFINED IN §1(2) OF THE ACT, AND IS ENGAGED INDIRECTLY IN THE TRANSPORTATION OF PROPERTY BY AIR, ARE ERRONEOUS.

While the first specification of error herein is essentially a question of law, behind it lies a determination of common carrier status according to the record herein, the essential elements of which are a general holding out of service to the general public indiscriminately for whomever wishes to use the service of Bay Area. If the operations of Bay Area do not meet this fundamental test, then whatever its operations might be deemed to be, it cannot be held to be that of a common carrier and necessarily cannot be held to be a common carrier air freight forwarder subject to Board jurisdiction. Under its Articles of Incorporation and other corporate restrictions and limitations demonstrated in this record, Bay Area cannot, has not and will not undertake to serve anyone, except members in good standing. Bay Area is neither capable nor

willing nor authorized to serve the general public indiscriminately nor all of the flower shippers and growers of flowers in the San Francisco Bay Area and peninsula, who may wish to use its service. As near as we can analyze the position of the Board herein, the facility or lack of facility to membership in Bay Area to a class of shippers was in some form determinative of this question. This is inverse reasoning and ignores the fundamental question as to a holding out of service to the public within the meaning of the rule, limited to the following:

> "However the results may be accomplished, the essential thing is that there should be a *public offering of the service,* or, in other words, a communication of the fact that the service *is available to those who may wish to use it.*" *Northeastern Lines Inc.,* 11 M.C.C. 179.

Even in cases where a particular public carrier has limited its service to a class or segment of the public there is still the essential requirement that the carrier must be willing to serve indiscriminately all members of the class. *Producers Trans. Co. v. Railroad Commission,* 251 U.S. 228.

Conversely, if the individual or party under inquiry, operates a continuing service of a highly specialized nature, and it invariably refuses its services to almost anyone who applies for it, and the service is definitely limited to an individual or a particular few individuals who contract with him, such person is not a public carrier. *Ace High Dresses v. J. C. Trucking Co.,* 122

Connecticut 578. The question of holding out a service generally and indiscriminately to the general public is ofttimes dispelled by a form of "specialization" as applied to the circumstances of the particular case.

In *Transportation Activities of M.T.Co. of Illinois,* 52 M.C.C. 33, the question of a determination of common carrier status was considered by the Interstate Commerce Commission, in which the question of a general holding out to the general public, based upon the elements hereinabove mentioned, was considered by the Commission. It was there said:

> "Specialization in respect to service may be evidenced (a) by the use of special equipment required by the commodities transported or adapted to the convenience of the shipper, (b) by the transportation only of certain commodities or of commodities the transportation of which requires the use of special equipment, equipment accessories, or specially trained personnel, (c) by the strict observance of shipper designated loading and unloading hours, or by other similar practices. On the other hand, specialization in respect of shippers served is evidenced or negatived by the number served, by the apparent ease or reluctance with which new contracts (shippers) are added either in replacement of lost accounts or in addition to accounts already served. It is indicated also by the allocation of certain vehicles to the exclusive use of certain shippers and by placing of shipper advertising on the vehicles used in its service."

The record in these proceedings clearly demonstrates the need for a specialized service, handling a highly perishable commodity, to-wit, flowers and decorative greens, by specially trained personnel, having a knewledge of the individual requirements of each flower grower and shipper, and which strictly observes member shippers' hours of loading and unloading, in keeping with their marketing condition as affected by harvest or production of flowers and as may be affected by the vagaries of time, distance and weather conditions. The close coordination between the member and the Bay Area Association on all phases of its service to such members, is further indicative of the "specialization" as announced in the *Midwest Transfer* case, *supra.* In this light, Bay Area is nothing more than a shipping department in behalf of each of the members individually.

On this rule of specialization and close coordination, we would like to refer to the language of the Interstate Commerce Commission in *N. S. Craig, Contract Carrier Application,* 31 M.C.C. 705, where the Commission stated:

> "The specialization which we have in mind may consist in the rendition of other than the usual physical services for the purpose of supplying the peculiar needs of a particular shipper. Such, for example, as the furnishing of equipment especially designed to carry a particular type of commodity, the training of employees in the proper handling of particular commodities or in the supplying of

> related non-transportation services, such as the assembling, placing or servicing of machinery. Or it may consist of nothing more than the devotion of all of the carrier's efforts to the service of a particular shipper, or, at most, *a very limited number of shippers* under a continuing arrangement which *makes the carrier virtually* a part of the shippers' organization."

While the Commission was considering a contract carrier operation in the *Craig* case, it was significant to note the precise language used by the Commission negativing common carrier status as dependent on the rule of specialized service, particularly in the case of the very limited number of shippers under a continuing arrangement which makes the carrier, as alleged, virtually a part of the shippers' organization.

In conclusion on this point, we respectfully submit that the express willingness and desires of a group of shippers and producers of flowers and decorative greens to band together to effect economies in transportation rates, costs and expenses is not solicitation within the meaning of the term. None of the witnesses called by the Enforcement Attorney could testify as to any overt act of solicitation by any of Bay Area's representatives.

Significantly enough, however, all discussions regarding the numbers of members of Bay Area took place prior to the institution of dues and assessment provisions established by the Board of Directors. This is hardly a showing of an offer to serve indiscrim-

inately any flower shipper who desires to use a service.

On the other end of the service in destination territory, the Board seemed to lay some emphasis on the status of the receiver of the shipment and the fact that in some instances the receiver absorbs the transportation costs, and held that such fact results in a holding out of service to receivers.

On one single occasion, a letter written by the executive secretary contained the following: "For the best service and the lowest charges, insist that your flowers are routed via Bay Area (no extra charge or hidden fee)."

It is not immediately apparent to us how a communication from a receiver to a shipper member of Bay Area, with whom he contracts for the sale, purchase or distribution of flowers on the open market, can in any way be attributed to an overt act of solicitation by petitioner. It is another way of stating that producers or marketers of agricultural or horticultural products in a bona fide attempt to arrange for the transportation of their own commodity, must be oblivious to economic conditions as reflected by communications from the people with whom they deal or contract. In any event, payment of transportation charges by the receiver or consignee, whether recovered from the seller as a member shipper or not, does not establish the service to be in behalf of the receiver-consignee.

It must be remembered that at no time do the shipments originate at the request of the consignees or so-called nonmembers to Bay Area. Until the shipments are delivered to Bay Area's drayman (Airport Drayage Co.), by the member shipper, Bay Area and its officers and employees have no knowledge whatever of the identity, wishes or desires of the intended purchaser or consignee. In its opinion and order under review, the Board adopted the reasoning of the examiner that since the receiver in the cases of C.O.D. shipments, whether straight or in consolidated movement, pays the transportation charges, including Bay Area's so-called advance charge *ipso facto* Bay Area is serving the consignee purchaser as an indirect carrier. Not only does this conclusion violate all concepts or principles of contract law, which requires a meeting of the minds, however slight, but it fails to recognize the principles of agency and the relative responsibility of the parties to such transaction.

This determination of the true relationship between the association and its members, was the crucial point of determination in the *Pacific Coast Wholesalers Association, et al. v. United States,* 338 U.S. 689.

In that case, the contention was made that the legal obligation to pay the freight charges in the case of certain of the shipments, rested on the non-member consignor to pay the full less-than-carload rate rather than the consignee, who was the association member. From this reasoning, the Interstate Commerce Commission held that the difference between the rate paid

by the non-member and the carload transportation cost was profit to the association and that "the association was thereby holding out its service to the general public." In this view, the Commission concluded that the operation was that of a freight forwarder subject to regulation under the freight forwarder act.

The District Court reversed the Interstate Commerce Commission on this question. It considered as decisive that no shipment by the association was ever undertaken except at the behest of and for the benefit of one of its members. Looking to the agency between the member and the association rather than between the buyer and seller, the court saw no reasonable ground for ruling that the association *was on a profit basis* or that it *was holding its service out to the general public.* With this conclusion, the Supreme Court of the United States agreed and held:

> "When this principal-agent relationship between member-purchaser and the association is borne in mind, it is clear that there is no profit to the association from the activity described in the Commission's report, and it is equally clear that the association, as agent for the members, does not 'hold itself out to the general public to * * * provide transportation of property * * * for compensation.'"

The Supreme Court, following this decision, held:

> "Looking to the agency between the member and the association, rather than that between buyer and seller, the court (below) saw no reasonable grounds for ruling that the association was on a

> profit basis, or that it was holding its services out to the general public. We agree."

The following language, in the opinion of the District Court in that case, is particularly enlightening:

> "The existence of this agency, is implicit in the findings of the Commission. The report states that 'all of the shipments involved are consigned upon instructions of the members of the association. Admittedly, the facilities of the association are not available to a non-member shipper otherwise than through arrangements made by a member. And the necessary arrangements are that the member as principal, instruct the association as agent to handle the shipment. Moreover, both the purpose and the result of the transaction is not to benefit the shipper, but to reduce transportation costs to the member through savings effected in cooperation with other members who likewise employ the association as transportation agent.' "

Petitioner respectfully submits that on this fundamental question of common carrier status, Bay Area does not hold out any service indiscriminately to the general public for compensation or hire; that its operations do, in fact, involve a "specialization" inconsistent with common carrier status, as to service, commodity and shippers, which is limited in its scope and number, and that petitioner does not assume responsibility for the transportation of member shipments from point of receipt to point of destination.

From a reading of the testimony of the member shippers from the president of the association on down, that appeared and testified in this proceeding, one fact stands out very clearly, namely, that in the event of loss or damage to shipments of flowers, the member does not look to Bay Area for any satisfaction whatever. Bay Area will assist such member at his request in processing a claim for loss or damage to the responsible carrier and nothing more.

Since on the authority of the Supreme Court of the United States in the *Pacific Coast Wholesalers Association, supra,* the status of the non-member consignee or receiver is irrelevant, it necessarily follows that in seeking to ascertain wherein any responsibility lies, we must of necessity consider the relationship between Bay Area, the nonprofit association, and its members alone.

As regards nonmembers, or even as regards strangers to the association a declared nonresponsibility would be unavailing, if, in fact, such service were rendered in behalf of such nonmember or stranger to the association. This for the very obvious reason that an *undertaking* to serve such parties carries with it the concomitant result of legal responsibility, whether assumed or disavowed or not; and herein is the crucial determining factor in this proceeding, found in the very context of the Act itself, in § 401(a) and paragraph 296 of the Board's Economic Regulations thereunder, which fixes the "air freight forwarder" with common carrier status in providing as follows: "In the ordinary and usual

course of his *undertaking* * * * (b) (he) assumes responsibility from the point of receipt to point of destination * * *"

If, as concluded by a Supreme Court, in the *Pacific Coast Wholesalers Case, supra,* a shipper's organization, such as Bay Area, cannot be held to render a service in behalf of a non-member, we fail to see wherein Bay Area has *"undertaken",* whether expressly or whether implied by law, to assume any responsibility to such non-member and fail to see on what basis, as established in this record, the consignee in such case could fix responsibility in his favor as against the petitioner. We submit, therefore, that there is no sound or valid basis for the conclusion by the Board that the petitioner bears or has assumed any responsibility whatever, other than that of principal and agent, in the handling of its members' shipments from point of receipt to point of destination, and that the conclusion of the Board in this repsect is contrary to the record and against law.

II. THE ORDER OF THE BOARD, DATED FEBRUARY 5, 1953, ENTERED HEREIN, ORDER NO. E7139, IS VOID FOR UNCERTAINTY IN THAT IT IS NOT DEFINITIVE OF THE ACTS, CONDUCT AND PRACTICES ALLEGEDLY INVESTING COMMON CARRIER STATUS ON PETITIONER AS TO WHICH IT SHOULD CEASE AND DESIST.

The cease and desist order entered herein (TR p. 389) has only one paragraph No. 1, which is in any way directive or prohibitive and provides as follows:

"IT IS ORDERED that:

1. Consolidated Flower Shipments, Inc.—Bay Area, its successors and assigns, and John C. Barulich, its executive secretary, and its officers, directors, agents and representatives cease and desist from engaging indirectly in air transportation in violation of § 401(a) of the Act * * *".

It is petitioner's contention that without specification of the alleged illegal activity which would constitute violation of § 401(a) of the Act, petitioners have not been informed and, as hereinafter developed, are unable to ascertain specifically what acts or practices or conduct in the operation of petitioner as a nonprofit cooperative association is deemed in violation of § 401(a) of the Act by the Board.

It is noted that the order was issued "upon the basis of such opinion and the entire record herein," which presumably has reference to the opinion which bears the same serial number, E7139, dated February 5, 1953, which is part of the record herein pursuant to stipulation.

Review of that opinion, on page 3 thereof, discloses the following language:

"Upon the basis of the Examiners' findings and conclusions, we are satisfied that Bay Area is a common carrier for compensation within the meaning of the Act."

An analysis of such a holding, as indicated in the footnote to the opinion on page 3, seems to be as follows:

"(a) The fact that Bay Area was, during the conduct of the investigation and the proceedings below, reincorporated as a nonprofit cooperative association act under the Agricultural Code of the State of California, is irrelevant and immaterial, in the view of the Board.

(b) Bay Area holds out a service to shippers i.e. members, or consignees, particularly with respect to consignees as reported by the Examiner on page 11 of his opinion, which the Board adopted in its opinion and order."

Petitioner submits that the last two items find no substantial support in the record and moreover, is contrary to the direct evidence in the record, as argued in the earlier portions of this brief.

In any event, assuming for the moment, a conclusion which we vehemently deny, some particular practice, procedure, operation or conduct on the part of Bay Area, in the performance of its services to its members is in the view of the Board in violation of § 401(a) of the Act, procedural due process, particularly notice, is not accorded to petitioner unless the cease and desist order in itself is particularly definitive of the acts and conduct which the Board would have Bay Area discontinue.

At best, the cease and desist order is merely a written declaration of the policy of the law as stated in the Act and merely directs Bay Area to observe the law, a function which the petitioner has assiduously endeavored to accomplish from the very beginning.

A mandatory order, such as here involved, should be sufficiently definite and certain to inform respondents or petitioner against whom it is directed, what is required to be done, so as to enable the Courts in proper cases, and if need be, to enforce them. *Illinois etc. Co. v. State Public Utilities Commission,* 245 U.S. 493.

So, a cease and desist order of an Administrative Board, which, when judicially construed the courts may be called upon to enforce by contempt proceedings, must, like the injunction and order of a court, state with reasonable specificity the acts which the respondent is to do or refrain from doing. *National Labor Relations Board v. Express Publishing Co.,* 213 U.S. 426.

In the latter case, the court was construing an order, which in effect, as in the instant proceeding, required an employer to refrain from violating the Act in any manner whatsoever.

In the niceties of the complex questions and issues involved on such a subject, petitioner respectfully submits that without clear and precise specification of the acts, operations and practices upon which the Board would hold that respondents are engaging indirectly in air transportation, or are in violation of any provisions of the Act, the order to cease and desist herein, upon the authorities cited, is erroneous and incapable of proper interpretation or application at all events. The least that can be said for the cease and desist order entered herein, is that the Civil Aero-

nautics Board is not willing to accept the sound and reasonable proposition that a nonprofit cooperative association of shippers, handling shipments for themselves on a nonprofit basis, as demonstrated in this record, are not common carriers, but in any event must be subservient to the Board's jurisdiction, and must, in the view of the Board, assume the status of a common carrier by applying for a letter of registration and thereby subject itself to Board jurisdiction and regulation under the Civil Aeronautics Act.

It is respectfully submitted that unless Congress intended such a result to follow from the enactment of the Civil Aeronautics Act at a time when both administrative rulings and opinions of our Appellate Courts have formally passed upon the question of common carrier status in an operation such as this, such a conclusion by the Board is not only erroneous on this record, but contrary to law.

The only answer of the Board to this objection, as contained in its opinion E7269, TR p. 396, issued on the Petition for Reconsideration, was that in the instant proceeding "It is inconceivable that, after a full hearing in which they participated vigorously and after the issuance of a detailed *opinion* respondents should be unaware of the practices and conduct which constitute engaging indirectly in air transportation."

We have carefully and conscientiously read the opinion and order consisting of fourteen pages, including the appendix attached thereto, and excerpts from the initial decision of the Examiner, and are

frankly at a loss to know to which particular acts, practices and conduct the Board has reference.

If it is the manner in which the advance charge is assessed and collected, it would be a simple matter for the Board to so state.

On the other hand, it would be difficult to reconcile such a conclusion, if that is the conclusion of the Board, with the opinion in the *Pacific Coast Wholesalers,* case, *supra.*

If it be the distinction, if any exists, between arranging to handle shipments on a straight basis, rather than a consolidation basis, it would be a simple matter for the Board to so state. If it be the numbers or location of the member-shippers of Bay Area, it would have been a simple matter for the Board, in its discretion, to conclude that a membership of "twenty six" is not in violation but that a membership of "fifty" would be in violation. However, we are at a loss to determine any rationale for such a distinction and it beggars the degree and ignores the principle involved.

If it be the manner in which Bay Area has contracted for the performance of local drayage, delivery and terminal services it would have been a simple matter for the Board to so state and corrective measures and procedures could be inaugurated to meet any such requirement. It should be noted however that the Board has no jurisdiction over truck operations.

If it be a distinction between an assessorial charge for terminal services at origin point, as opposed to a

consolidation charge in behalf of the association, it would have been a simple matter for the Board to so state and corrective measures could be invoked to remedy the objection.

If it be the form and content of the Articles of Incorporation and By-Laws, with respect to purposes, authority and membership, or the various classifications of membership, it would have been a simple matter for the Board to so state and appropriate amendments to the By-Laws could be invoked (TR, John C. Barulich, pp. 271-274).

We could go on at length and endeavor to ferret out what, in the view of the Board is objectionable, and still could not feel secure against the charge of alleged violation of § 401(a) of the Act, under the form of the cease and desist order herein, *save and except the filing of an application for a letter of registration as a common carrier air freight forwarder.* It is respectfully submitted that the failure or refusal of Bay Area to apply for a letter of registration, is no answer to the fundamental question of jurisdiction over common carriers and the validity of the cease and desist order in its present form.

III. THE RESPONDENT BOARD ABUSED ITS DISCRETION UNDER §1005(d) OF THE CIVIL AERONAUTICS ACT IN FAILING, NEGLECTING OR REFUSING TO STAY ITS ORDER UNDER REVIEW DURING THE PENDENCY OF AN INVESTIGATION IN THE RENEWAL OF PART 296 OF ITS ECONOMIC REGULATIONS, ASSIGNED DOCKET NO. 5947, AND THE DETERMINATION OF AN APPLICATION FOR AN EXEMPTION ORDER OF PETITIONERS PENDING THEREIN.

The power of the Board under § 1005(d) of the Act is one that should be exercised pursuant to a sound discretion in the particular case.

Petitioners submit, that, as declared by the Board in its order serial No. E7140, Docket No. 5037, TR p. 390, "2. The application (for an exemption order) raises questions of such a complex and controversial nature, that they should be thoroughly explored in a full public hearing."

Further, there appears to be some question in the view of the Board, in its administration of part 296 of the Economic Regulations, as demonstrated by its opinion in Docket No. 5947, TR p. 406, et seq. as to any need or requirement for regulation of so-called shippers' associations and the extent to which there is or may be a general need for regulation of indirect air carrier services, including the type of services performed by Bay Area as a nonprofit cooperative association of shippers.

The Examiner ruled, and we submit erroneously (official TR p. 374 et seq.) that the application for exemption was not an issue in this investigation, and in refusing to consider the exemption application in

these proceedings the Examiner (TR p. 326) ruled that:

> "Regardless of the fact that even a cease and desist order might be issued in this case, that would be no bar to the Board's granting this respondent an exemption, or, in fact, be no bar to the Board's granting a letter of registration if the Board saw fit to do so. I am not speaking for the Board, you understand."

Yet, in another proceeding ordered investigated on the date of the issuance of the opinion and the cease and desist order herein, to-wit, February 5, 1953, the Civil Aeronautics Board denied petitioner's exemption application without prejudice to the renewal thereof, in Docket No. 5947, and instituted the investigation of Docket No. 5947 naming petitioner and ten other similar shippers' association as respondents, for the purpose of determining future policy and regulation under the Act.

Under the order of investigation, the Board referred to its holding in the instant proceeding, Docket No. 4902: "That a shippers' association *may* be an indirect carrier" (emphasis ours), and that in the light of such holding and the imminent expiration of part 296 of the Board's Economic Regulations, a thorough investigation is required with a view to determining a sound permanent policy for the future of indirect carriers of property and for the forwarder industry, and further indicating that inquiry of a formal nature is necessary to determine the extent to which there is

a continuing need, if any, for classification of all indirect air carriers of property.

The membership comprising the present nonprofit cooperative association of Bay Area, opinion and order E7139, p. 3, footnote 3, sprang from the voluntary initiative of flower growers and producers in the San Francisco bay area and has developed and grown into a closely knit and closely supervised association for their individual benefit.

The record herein is replete with the need of such an organization in the interests of the industry, banded together as it has in the Bay Area association, to obtain a competitive basis of flowers and decorative greens sold and distributed by the members in eastern markets. The sudden termination of Bay Area service, which, as evidenced in this record, comprises in excess of fifty (50) percent of the flower movement by air to eastern markets from this area, would have such an adverse economic effect upon the entire flower industry in this area as to result in irreparable loss and injury to the members and the industry as a whole (see petition for stay on file herein).

In these circumstances, which must be thoroughly explored before an order can be made on such exemption application, a cease and desist would work a grave injustice upon the Bay Area members and the industry they represent, if, on the conclusion of the investigation in Docket No. 5947, it be determined by the Board that the application for exemption is well founded and should have been granted in the public interest.

In advancing this ground and the adverse consequences which should result from the Board's order, if enforced, respondents are not unmindful of the fact that it has traditionally been the broad general policy of Congress in enacting related legislation affecting surface carriers (§ 402(c) of the Interstate Commerce Act), to exempt or exclude by whatever interpretation is deemed best appropriate such operations from the jurisdiction of regulatory Boards or Commissions, where such operation is exclusively devoted to the handling of agricultural, horticultural or farm products, such as flowers and decorative greens, by a non-profit shippers' association in behalf of its members.

Certainly no violence would be done to this policy of Congress; rather, the public interest would be served, if an activity devoted exclusively to the handling, shipping and distribution of such a highly perishable agricultural commodity as flowers and decorative greens, be held to be *exempted* or *excluded* from jurisdiction of the Civil Aeronautics Board.

Such a conclusion is in harmony with the opinion of the Board in the *Air Freight Forwarder* case, 9 C.A.B. 473, wherein the Board used the following language:

> "The term 'freight forwarder' is used loosely in common parlance to cover a wide variety of activities in connection with the handling of freight, *but will be used here* in its strictly technical sense, following the specific characteristics of a forwarder as set forth in Part IV of the Interstate Commerce Act. A surface forwarder *holds himself out to the general public as a transporter for compensation,* of property in interstate

commerce, assuming responsibility for the same from point of receipt to point of ultimate destination; he assembles and consolidated that property into bulk shipments which, at some terminal point, he breaks up and distributes; he uses the services of an underlying carrier for the whole or some part of the transportation of such shipments." (Emphasis ours.)

It is hoped that the Board will give due consideration to this policy of Congress in its conclusions in Docket No. 5947 and petitioner's application for an exemption order therein.

The point here made is that in the exercise of a sound discretion the Board should have stayed the effective date of its cease and desist order herein, pending the conclusion of the investigation in Docket No. 5947, and that its refusal so to do with the consequent result herein mentioned, constitutes an abuse of discretion.

CONCLUSION.

It is respectfully submitted that the findings and conclusion of the Board in its opinion and order herein and the cease and desist order entered herein, are erroneous and against law and that Bay Area does not hold itself out indiscriminately to the general public as a common carrier for compensation or hire as an indirect air carrier, as that term is defined in the Act; and, the order under review and the cease and desist order entered herein are void for uncertainty in not being definitive of the acts, conduct and

practices allegedly investing common carrier status in Bay Area; and that,

The Board abused its discretion in failing or refusing to stay its cease and desist order herein, pending a full and complete hearing and investigation in Docket No. 5947.

Wherefore, petitioner respectfully prays that this Honorable Court set aside and annul said cease and desist order, or that the order of the Board herein be set aside and the cause remanded to the Board for further hearing and investigation in connection with its said proceedings in Docket No. 5947, and petitioner's application for an exemption order filed therein.

Dated, South San Francisco, California,
January 25, 1954.

Respectfully submitted,
ANTONIO J. GAUDIO,
Attorney for Petitioner.

No. 13,727

United States Court of Appeals

For the Ninth Circuit

CONSOLIDATED FLOWER SHIPMENTS, INC.—BAY AREA,

Petitioner,

vs.

CIVIL AERONAUTICS BOARD and AIRBORNE FLOWER AND FREIGHT TRAFFIC, INC.,

Respondents.

BRIEF OF AIRBORNE FLOWER AND FREIGHT TRAFFIC, INC., RESPONDENT.

PAUL T. WOLF,
155 Sansome Street, San Francisco 4, California,
Attorney for Airborne Flower and Freight Traffic, Inc., Respondent.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Cases

Statutes

No. 13,727

United States Court of Appeals
For the Ninth Circuit

CONSOLIDATED FLOWER SHIPMENTS, INC.—BAY AREA,
Petitioner,

vs.

CIVIL AERONAUTICS BOARD and AIRBORNE FLOWER AND FREIGHT TRAFFIC, INC.,
Respondents.

BRIEF OF AIRBORNE FLOWER AND FREIGHT TRAFFIC, INC., RESPONDENT.

INTRODUCTORY.

The main issue in this case is simply whether Consolidated Flower Shipments, Inc.—Bay Area, petitioner, (hereinafter referred to as Bay Area) has engaged and continues to engage as an indirect air carrier of property as a common carrier for compensation or hire in interstate commerce in violation of the Civil Aeronautics Act of 1938 (49 U.S. Code 401) (52 Stat. 977) (hereinafter referred to as Act), and without license or authority from the Civil Aeronautics Board (hereinafter referred to as Board). The Board has so determined.

Airborne Flower and Freight Traffic, Inc. (hereinafter referred to as Airborne) holds letter of registration No. 14, issued by the Board, as an air freight forwarder, and appears in this case on the basis of a formal complaint which it filed with the Board, the hearing on which was consolidated with the Board proceeding by order of the Board, dated December 29, 1951. The complaint was filed pursuant to statutory authority, Civil Aeronautics Act Section 1002a, (49 U. S. Code 642) (52 Stat. 1018).

With few exceptions, Bay Area does not attack the factual findings of the Board but it does disagree with the conclusion based on these findings, that Bay Area is a common carrier and therefore subject to the terms of the Act and Board jurisdiction.

So far as physical operations of Bay Area are concerned, it is admitted on page 1 of Bay Area's brief:

> "* * * petitioner has no quarrel with the findings of the Board that in so far as the physical aspects of the operations and services performed by Bay Area in behalf of its members, in assembling and consolidating their shipments, and arranging for the transportation thereof by air and arranging for the ultimate distribution to consignees of the members of Bay Area, the operations are not unlike those usually performed by common carrier air freight forwarders."

It might be pointed out that the Board did not find it necessary to determine whether Bay Area is an air freight forwarder under the definition contained in Part 296 of the Economic Regulations (45

F. R. 3522). It concluded that Bay Area was acting as a common carrier for compensation under the Act and is operating as an indirect air carrier in violation of Section 401a thereof (Board Opinion, p. 5). (The opinion and order of the Board, Order No. E-7139, dated February 5, 1953, is before this Court in mimeographed form by stipulation. The Board opinion incorporates as an appendix fourteen pages of the initial decision of Examiner Walsh and reference thereto will be noted in this brief as Board Opinion, Appendix.)

Bay Area argues mainly that because it has a limited membership consisting of flower shippers from one locality it does not hold its services out to the public, and cannot be considered a common carrier.

It must be kept in mind that what does or does not constitute common carriage necessarily depends not only on the type of operation conducted but on the quantity of commodities which might and do move, and the manner of transportation involved. The carriage of air freight is in its infancy and to date a limited number of types of commodities are carried; for instance, perishables such as flowers going across the continent naturally lend themselves to air transportation. The same is true of electronic equipment, machine parts, drugs and other similar items where speed of transportation is most important. Viewed in this light, if fifty percent of the flower business in a certain locality is carried by one agency such as Bay

Area composed of about one-half of the shippers of that commodity who have banded themselves together in order to secure speedy and cheap transportation, it can well be found, as the Board found, that such an agency is a common carrier, particularly where the flowers are shipped not to a few consignees but to 750 consignees situated throughout the United States (Board opinion, Appendix, p. 11).

It might likewise be pointed out at the outset that Bay Area is not a cooperative as that term is ordinarily considered. The flowers of the individual members are not pooled and the proceeds of sales are not divided. The members themselves at all times own the flowers and Bay Area acts as a transportation agency. Bay Area does not own or sell a single flower.

I. STATUTORY PROVISIONS.

The Civil Aeronautics Act of 1938 provides in Section 1(2) (49 U. S. Code 401) (52 Stat. 977):

> " 'Air carrier' means any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation: Provided, That the Board may by order relieve air carriers who are not directly engaged in the operation of aircraft in air transportation from the provisions of this Act to the extent and for such period as may be in the public interest."

Under the proviso clause above set forth, the Board in Economic Regulations Part 296 defined air freight

forwarders and exempted them from certain provisions of the Act.

Section 1(10) provides:

> " 'Air transportation' means interstate, overseas or foreign air transportation or the transportation of mail by aircraft."

Interstate air transportation, with which we are concerned, is defined in Section 1(21):

> " 'Interstate air transportation' * * * mean the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft in commerce between respectively * * *" (places within the United States, etc.)

Section 401(a) of the Act (49 U. S. Code 481) provides:

> "No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation * * *."

In Section 1(2), heretofore quoted, and Section 416(b) (49 U. S. Code 496), the Board is authorized to grant exemptions to air carriers rather than requiring the procurement of the certificate provided for in Section 401.

II. BAY AREA IS A COMMON CARRIER FOR COMPENSATION.

1. The operations of Bay Area.

Bay Area was originally formed for the purpose of securing cheap air transportation. As stated by the Board in its opinion, it was "motivated by a desire to obtain lower air freight rates * * *." (Board Opinion, Appendix, p. 2). And:

> "Both prior to and subsequent to incorporation new members were solicited for Bay Area from among the flower shippers in the San Francisco area by Mr. Reynolds and Mr. and Mrs. Decia, and later by Barulich for the express purpose of increasing the volume of Bay Area's shipments in order to obtain lower air freight rates" (Board Opinion, Appendix, p. 10).

In its brief, Bay Area insists that it was formed to procure a specialized trucking service for the handling of perishable flowers, to effect savings and economies in the cost of transportation and to afford a more closely consolidated operation between the shipper and the transportation agency. The Board findings, above set forth, refer only to cheap transportation and not to the other purposes stated. These findings are well supported by the testimony. In addition to the Board findings above set forth, the following appears in the Board Opinion, Appendix, page 11a:

> "Insofar as Bay Area association itself is concerned it is significant that the sole interest of the members is in securing the lowest possible air freight rates for transportation of their flowers to eastern markets. * * *."

Apparently the members did secure cheaper transportation. McPherson, the president of Airborne, testified:

> *"Airborne had been in operation three years and along came an organization, Bay Area, and took away a substantial part of our business.* We had formerly been an association of shippers, and the Civil Aeronautics Board had had a hearing and we had to participate, and had been told to get a certificate, and had gotten one." (Emphasis added.)

Bay Area has expanded its operations so that at the time of the hearing it had a membership of 26 flower growers and shippers in the San Francisco Area. They pool their small individual flower shipments into a large single shipment solely for the purpose of transportation by air at lower bulk rates (Board Opinion, p. 3). Not only had the membership of the organization expanded, but the number of consignees who used the transportation service rendered by Bay Area had risen to the number of 750 (Board Opinion, Appendix, p. 8).

2. Bay Area membership is open to all flower shippers in the San Francisco Bay Area.

It is obvious from the reading of the testimony that although Bay Area considers itself a small cohesive group not holding its service out to the public and thus attempts to avoid a designation as a common carrier, that this is not the fact. As a matter of fact, there was even testimony that a shipper not a member of Bay Area made use of its services.

Witness Lee, who has never been a member of Bay Area, testified that he shipped via the Bay Area service during the months of February, March, April, May and June, 1950 (Tr. p. 42-46). This period of time was a year after the formation of Bay Area. Testifying concerning these shipments it was stated (Tr. p. 52-53):

"Q. And those manifests reflect shipments which you made via the Bay Area Service for the dates indicated?

A. That is right.

Q. And to the consignees indicated?

A. That is right.

Q. Mr. Lee, when you started shipping over Bay Area what was the occasion? Did someone request that you ship, or was it your own idea?

A. It was requested by the consignee.

Q. What procedure did you follow to make those shipments over Bay Area?

A. The girl in the office, the shipping department, just called, I believe it was Mr. Reynolds, to pick up the shipments.

Q. I see. Were any questions asked about membership?

A. You mean of the girl?

Q. Yes.

A. No."

Witness Gregoire testified that he was solicited to join Bay Area (Tr. p. 120).

Witness Alexander testified (Tr. p. 143):

"Q. I see. After these original meetings, do you recall any discussion as to whom the members of the group could be?

A. It was open to all shippers and growers alike.

Q. What type of shippers and growers?

A. Flower shippers.

Q. All flower shippers and growers?

A. Yes, sir.

Examiner Walsh. You are speaking of the flower growers and shippers in this area?

The Witness. In this area, yes."

He further testified (Tr. p. 144) that the organization was open to all who signed a certain letter of April 4, 1949, and that the letter was presented to everybody; presented to at least 30 growers and shippers and that at that time there were about 50 growers and shippers in the area, and that if they were not contacted with the letter they were contacted by telephone.

Witness Walker of the Belmont Floral Service testified that Barulich and others asked him to become a member of Bay Area (Tr. p. 147).

Witness Piazza originally shipped by Bay Area and then stopped and after he ceased Bonaccorsi, a member and officer, requested him to continue in the organization (Tr. p. 166).

Virginia Decia, the original secretary-treasurer of Bay Area, testified that it was the policy of the association to accept as a member any responsible flower grower or shipper and that the organization was open to anyone, that there was no restriction (Tr. p. 214).

Witness Barulich, executive-secretary of Bay Area, testified (Tr. p. 299):

> "Q. Mr. Barulich, can you tell me, in your own knowledge has any application for membership in Bay Area ever been refused.
>
> A. To my knowledge, No."

Witness Zapettini, the first president of Bay Area, testified (Tr. p. 535):

> "Q. During the entire time of your administration, has any application for membership ever been refused?
>
> A. To the best of my recollection, no."

The foregoing proves conclusively that Bay Area membership has at all times been open to all flower growers and shippers in the San Francisco geographical area, and that no applicant has ever been refused admission.

3. Bay Area has consistently solicited the use of its transportation services by consignees.

The foregoing indicates that Bay Area at the San Francisco end held its services open to a large segment of the public by means of solicited membership. The only common interest of the membership was that all members were in the flower shipping business. This alone would be enough to show common carriage, but in addition the evidence clearly shows that Bay Area and its members *held Bay Area services out to any flower buyer in the United States who wanted to use them.* Witness Walker testified (Tr. pp. 148-9):

"Q. Have you received requests from your consignees to ship via Bay Area?

A. Yes, we have received requests, several of them.

* * * * * * *

The Witness. We had a request from Mr. Cereghino, who represents us in New York, on some of our colored merchandise, to ship through Bay Area. At the same time, we have had letters from various people from various markets, requesting Bay Area, which we have never paid any attention to, but just go along and ship the way we were."

Witness Gillo testified (Tr. p. 177-8):

"Q. Can you recall from memory the names of the customers who have specifically requested the Bay Area service during the recent period?

A. There has been quite a few of them, from time to time but I really could not name them off."

EA-323 was a letter written by Nuckton, a member and then president, explaining about Bay Area routing and definitely shows an attempt to sell the use of Bay Area services.

The correspondence between Bay Area and Cereghino, one of its eastern agents, indicates solicitation for the use of Bay Area services.

In the first letter, written by Barulich, there appears the following (Tr. p. 291):

"Contact the big florist houses in Philadelphia, and see if they can put some pressure on Bernacki to handle all the flowers in Phily. In

that manner, he will have to handle ours. His service is by far superior to our present trucker. *Our people have written to some of their outlets and asked for their support, but as yet no results.*" (Emphasis added.)

EA-190 is a letter written by Nuckton to Linwood Wholesale Florists in Detroit, Michigan. It is an obvious attempt to have the florists of Detroit use Bay Area services rather than the services provided by Airborne. Nuckton states, "it seems very difficult to get a foothold in Detroit," and the letter is a solicitation for the use of Bay Area services.

EA-189 is a letter written by Barulich to Seattle Flower Growers and ends up by stating: "For good service and reasonable rates insist that your flowers are routed by Bay Area."

Barulich made a trip east and called on florists in New York, Detroit, Kansas City and St. Louis (Tr. p. 301).

Witness Zappettini testified (Tr. p. 504):

"Q. In your office as President, to your knowledge, did Bay Area, as such, actively solicit any traffic from anyone other than its own members—solicit business, in other words?

A. Our office, you mean to say?

Q. No, Bay Area.

A. Bay Area ever solicit members?

Q. Solicit traffic.

A. Oh, yes, sure.

Q. And under whose auspices would that be done?

A. It would be done by the President or the Board of Directors, or the annual meeting, or semi-annual meeting, whatever it might be."

That the solicitation was successful appears in the testimony of Barulich (Tr. p. 577):

"Q. Approximately how many consignees would you say that Bay Area members ship to throughout the United States?

A. Oh, a rough estimate which we submitted to the Board of Directors on one of our stipulations, I believe, the figure used was in excess of 750, which was a rough tabulation.

Q. Are the consignees scattered throughout the forty-eight states of the United States, the District of Columbia, and, occasionally, Hawaii and Canada?

A. Yes. I don't believe I remember any Hawaiian shipments. There might have been one. I don't remember such a shipment."

The foregoing constitute only a few instances among the many attempts by Bay Area and its members to solicit the use of Bay Area service throughout the United States and actually to render Bay Area service when it was requested by the flower buyers. Certainly, it can well be said that Bay Area service was, and is, held out to the public and that the only qualification for the use of the service is that the user be in the flower business.

The California Supreme Court in *Landis v. Railroad Commission,* 220 Cal. 470, (31 P. 2d 345) at page 474 has stated:

> "His offer to the public was such that he could not with reason be classed as a private or contract carrier. True, his customers were limited to the particular class of those who desired the transportation of furniture and like personal effects. But those were the commodities which he offered to carry and his 'public' were they who desired the transportation of those commodities. As supplied to certain types of common carriers, *'the public does not mean everybody all the time'.*" (Emphasis added.)

It might be pointed out that Bay Area, the corporation, does not sell flowers—it sells service and its members sell the flowers, and the limitation of the service to one class of merchandise is insufficient to qualify Bay Area as a private carrier. The law is clear that the mere fact that a carrier ships only for those with whom it has a contract is also insufficient to eliminate the aspect of common carriage and, of course, the same would be true where the contract takes the form of a membership in a corporation.

In *Haynes v. MacFarlane,* 207 Cal. 529 (279 P. 436) the Court said at page 534:

> "The trial court found that the status of the defendant had not been changed by the so-called 'private contract' method of his operations and the record supports the finding and conclusion based thereon. If such a studied attempt to evade the provision of the statute should prove availing the law would become a nullity and the primary purpose of the act to regulate autotruck transportation companies would come to naught."

The application of the law of common carriage to a situation as is here presented is well stated in *In Re Pacific Motor Transport Company,* 38 Cal. R. Com. Rep. 874:

> "A misconception in regard to the nature of the common carrier has arisen through the use of the misleading expression that he 'undertakes generally and for all persons indifferently to carry goods and deliver them for hire.' As a matter of fact in a multitude of instances his offer relates to a very limited portion of the public, but is, of course, made to anyone of the public who chooses to place himself in the class to which the offer is directly made, and in this sense only is the undertaking general."

From the foregoing it is apparent that both at the San Francisco area, from whence Bay Area operates, to all points throughout the United States where it operates, or endeavors to operate, there is a complete factual situation showing that Bay Area is a common carrier.

Its organization is open to any flower shipper at the San Francisco end and to any flower buyer or consignee throughout the United States. It is not, in any sense of the word, a shipper organization dealing only with a limited group.

4. Bay Area operates as a common carrier for compensation.

Bay Area has argued that it does not operate for compensation or for hire. The Board has found that it does operate as a common carrier for compensation. (Board Opinion, Appendix, p. 12.)

The members on prepaid shipments pay Bay Area, the corporation, for its services, and on collect shipments the consignees pay. On collect shipments it does not matter a bit whether the sale is outright or on consignment; the charges for the service are, in both cases, paid by the consignee. Bay Area thus is acting for compensation every time it makes a shipment. It is true that a profit may not appear on the corporate books, but whether or not a corporation makes a profit does not mean it is not receiving compensation nor does it make it any less a common carrier.

In *Schenley Distillers Corporation v. United States,* 61 Fed. Supp. 981, (aff'd 326 U.S. 432, 90 L.Ed. 181), it was held that a Schenley subsidiary performing exclusive trucking service for its parent and affiliated companies was subject to regulation by the Interstate Commerce Commission as a contract carrier as having performed services for compensation even though it was reimbursed only for operating expenses.

The testimony is clear that Bay Area charged a total of 60 cents per box of flowers shipped for its services. From this amount Barulich received 55 cents for his trucking and handling charges and Bay Area retained 5 cents.

As pointed out above, the total charge on a prepaid shipment is paid by the shipper member and naturally must be reflected in the price of the flowers sold, which means that the burden ultimately falls on the purchaser of the flowers who, at the same time,

is purchasing the transportation services of Bay Area and paying therefor 60 cents per box. In the case of collect shipments, it is even clearer that the purchaser of the flowers directly pays this 60 cent charge for all collect shipments. This charge appears on the airbills to be collected from the consignees.

It seems clear that Bay Area receives gross compensation of 60 cents per box on each box of flowers shipped, and net compensation of 5 cents per box.

The fact that there may be no profit to Bay Area in the transaction is immaterial. There could be a profit if the per box charge was increased.

5. Pacific Coast Wholesalers Association v. United States is not applicable.

In its brief, Bay Area relies on the case of *Pacific Coast Wholesalers' Association et al v. United States,* 338 U.S. 689; 94 L.Ed. 474. That case is not applicable to the instant situation. The case dealt with the question of legislative exemption concerning surface freight forwarders as set forth in Section 402(c) of the Interstate Commerce Act. (49 U.S. Code 1002-(c)), (56 Stat. 284, amen. 64 Stat. 1113), which section exempts:

> "* * * the operations of a shipper, or a group or association of shippers, in consolidating or distributing freight for themselves or for members thereof, on a nonprofit basis, for the purpose of securing the benefits of carload, truckload or other volume rates, * * *."

The precise issue in that case involved the question of exemption under Section 402(c) and we quote the language of the Court:

> "The *issue presented is whether this association,* with respect to the shipments here involved, *is subject to regulation* by the Interstate Commerce Commission as a freight forwarder *or stands in exempt status under section 402 (c) (1) of the Interstate Commerce Act.* This section reads as follows: 'The provisions of this part shall not be construed to apply (1) to the operations of a shipper or a group or association of shippers, in consolidating or distributing freight for themselves or for members thereof, on a nonprofit basis, for the purpose of securing the benefits of carload, truckload, or other volume rates, * * *.' " (Emphasis added).

The Court then discussed the position of the Interstate Commerce Commission, as set forth in its decisions in the particular case. When the Commission first considered the matter, it determined that the exemption applied. Two years later the Commission reversed itself and held that the exemption applied only where the shipments were on an f.o.b. origin basis, and exemption did not apply where the shipments were f.o.b. destination or delivered price basis. The District Court reversed the Commission and determined that the Association was on a nonprofit basis and did not hold its service out to the public. After considering the prior decisions in the case the Supreme Court stated:

> "There is nothing in the language of the Act or the legislative history to suggest that Congress intended the exemption to turn on the type of shipment which was involved, whether f.o.b. origin or f.o.b. destination (delivered price). On the contrary, it is clear that the nature of the relationship between the members and the group was thought to be determinative. Under that test, the valid claim of the association to the statutory exemption is established by the original Commission decision."

A perusal of the statements of the Court, as quoted above, shows that the only issue which concerned the Supreme Court was whether or not the statutory exemption applied.

That decision in no way assists Bay Area in this case, as there is no statutory exemption in the Civil Aeronautics Act, nor has the Board exempted from regulation so-called nonprofit associations, and properly so, as such exemption would in no manner carry out the policy of the Board, as set forth in *Air Freight Forwarder Case,* 9 C.A.B. 473; (C.C.H. Current C.A.B. Cases p. 16,510), which granted exemption to air freight forwarders and prescribed regulations for their operation:

> "* * * we conclude that the public interest in and need for the service of air freight forwarders has been sufficiently established to justify the authorization of freight forwarder operations for a limited period during which essential experience can be developed upon which a permanent

policy may be soundly determined. During the period this authorization remains in effect *we will maintain a close and constant watch over the development of indirect air services not only to prevent practices that might prove detrimental to the development of a sound air transportation system* but also to insure the development of a valid and reliable record of experience upon which the contribution of the air freight forwarders may be properly appraised" (Emphasis added).

Bay Area argues that it has undertaken no responsibility in regard to non-members. This is placing the cart before the horse for if Bay Area is a common carrier the legal responsibility involved in carriage of freight exists, whether or not there is an express contract or any contract with the receiver of the freight to that effect.

From the foregoing, it is quite apparent that Bay Area is a common carrier despite the fact that it has changed the form of its organization several times in order to escape such a conclusion.

It holds its membership open to all flower shippers in the San Francisco geographic area and has never turned down an applicant. It holds its transportation services open throughout the United States for any buyer of flowers who desires to use it and has solicited buyers to use the service. It receives compensation for its transportation services to the extent of 60 cents per box of flowers, of which 5 cents per

box is net. It is acting as an indirect air carrier without any authority from the Civil Aeronautics Board and thus is in violation of Section 401(a) of the Act.

III. THE CEASE AND DESIST ORDER OF THE BOARD IS SUFFICIENTLY SPECIFIC.

Bay Area argues that the Board order is invalid because it does not specify the illegal activities of Bay Area.

It is quite obvious that the Board has ordered Bay Area to stop doing what it has been doing for the past several years. In other words, it should stop operating its transportation service as an indirect air carrier, and the members of Bay Area should ship their flowers from the San Francisco district in the same legal manner of air transportation as is followed by the flower shippers who are not members of Bay Area.

Bay Area relies upon *National Labor Relations Board v. Express Publishing Company,* 312 U.S. 426, 85 L. Ed. 930. That case does not express any new law; naturally an administrative order or a Court injunction should be sufficiently clear so that the persons enjoined may know what they are forbidden to do. The Court states:

> "The breadth of the order, like the injunction of a court, must depend upon the circumstances of each case, the purpose being to prevent violations, the threat of which in the future is indi-

> cated because of their similarity or relation to those unlawful acts which the Board has found to have been committed by the employer in the past."

In the case of *Keeshin Motor Express v. Interstate Commerce Commission,* 134 F. (2d) 228, Ill.—Court of Appeals, Seventh Circuit (Certiorari denied by Supreme Court, 88 L. Ed. 427), the injunction provided that Keeshin was not to collect transportation charges other than those provided for in its published tariffs. The evidence presented consisted of tariff violations in certain districts and it was argued that the injunction should be confined to non-violation in those districts. The Court decided that the injunction was valid and violations in all districts would be enjoined.

The California Supreme Court has stated in *Gelfand v. O'Haver,* 33 Cal. (2d) 218, page 222 (200 P. 2d 790):

> "There can be no doubt that an injunction must not be uncertain or ambiguous and defendant must be able to determine from it what he may and may not do * * *. *It is also true, however, that resort may be had to the findings of fact and conclusions of law to clarify any uncertainty or ambiguity in a judgment."* (Emphasis added.)

In *City of Vernon v. Superior Court,* 38 Cal. (2d) 509, at page 514 (241 P. 2d 243), the Supreme Court further stated:

> "In arriving at a correct interpretation of the decree and its meaning and effect it is incumbent upon the court to consider not only the language of the decree * * * *but also the purpose and object of the litigation which terminated in the decree."* (Emphasis added.)

This last quotation relied upon by the California Court was from a Utah decision, *Ophir Creek Water Company v. Ophir Hill Consolidated Mining Company,* 216 P. 490.

Applying the foregoing law, it can be seen that resort may be had to the Board order, to the findings of fact and conclusions of law, and to the purpose and object of the investigation proceedings. It would have been useless for the Board to have reincorporated in its cease and desist order a complete restatement of its opinion containing the findings and conclusions. It will be noted that the order to cease and desist itself contains the following language:

> "* * * having issued its opinion containing its findings, conclusions and decision, *which is attached hereto and made a part hereof;"* (emphasis added).

The order thus is not the single page relied upon by Bay Area but the entire opinion, decision, findings and conclusions. It is quite apparent that Bay Area knows the purpose of the litigation and those acts which it should refrain from performing.

IV. THE BOARD DID NOT ABUSE ITS DISCRETION IN REFUSING TO STAY THE EFFECTIVE DATE OF THE ORDER UNTIL THE TERMINATION OF PROCEEDINGS IN DOCKET 5947.

The *Air Freight Forwarder Case,* supra, permitted the operation of air freight forwarding for a period of five years. At the time of deciding the *Air Freight Forwarder Case,* the Board issued Economic Regulations Part 296 setting forth the method under which air freight forwarders could operate by procuring letters of registration. The five year period was to terminate in the Fall of 1953 and in February, 1953, at the same time the order on review was issued, the Board created Docket 5947 and ordered an investigation concerning the renewal of Part 296 and an investigation of indirect air carriage of property. The order bears the number E-7141 and appears in the transcript at page 406. A reading of that order indicates that its purpose is a complete investigation of all indirect air carriage of property including an investigation of shippers' associations. It made parties to the proceeding a number of so-called shippers' associations, including Bay Area.

Bay Area's final point is that the Board abused its discretion in refusing to stay the cease and desist order on review until the termination of Docket 5947, on the ground that if an exemption were to be granted to shippers' associations in that docket there would be an injustice done to the Bay Area members. It should be a sufficient answer to state merely that this Honorable Court has in effect already passed upon this point.

It will be recalled that the petition for review filed by Bay Area herein on April 8, 1953 (Tr. p. 413) was accompanied by a motion to stay the effective date of the Board order pending this review and also pending the conclusion of proceedings in Docket 5947.

This Court on June 12, 1953 dismissed the petition on the ground of lack of jurisdiction but on leave thereafter granted on June 30, 1953 permitted the late filing of the petition and Bay Area's motion for a stay.

The decision of the Court was that the Board order should be stayed until decision by the Court on the merits of the petition of review. By failing to stay the Board order pending the conclusion of Docket 5947, it is assumed that the Court denied that portion of Bay Area's motion. This was indeed quite proper as Section 1006(d) of the Act (49 U. S. Code 646d) gives the Court the power to grant interlocutory relief which, of course, means only during the pendency of the review and not during the pendency of a completely extraneous proceeding.

However, on the merits, it is clear that the Board did not abuse its discretion. At page 396 of the transcript appears the Board opinion and order on reconsideration and request for stay. The Board opinion sets forth (Tr. p. 402) the various reasons why it would not stay its order until the conclusion of Docket 5947.

The opinion states that even if Bay Area were to terminate its operations, it does not follow that such action would have a serious adverse effect upon Bay Area members or the industry as a whole. The Board points out that even though Bay Area handles a substantial portion of the flower movement by air from San Francisco, it does not follow that the operations of shippers who do not use Bay Area are not profitable. Otherwise, Bay Area would have the business of all the San Francisco flower shippers. As a substantial portion of flower shipments by air is not handled by Bay Area, the termination of Bay Area services would not have an adverse economic effect upon the entire flower industry.

There is adequate air service from San Francisco by regulated forwarders, and it is to be noted that for a certain period in 1950 when Bay Area was inactive Airborne handled all of Bay Area's shipments. It is also to be noted that many members of Bay Area do not use its services exclusively. (Tr. p. 384.)

The Board (Tr. p. 403) states:

> "We do not believe that Congress intended that nonprofit associations competing directly with carriers subject to regulation should escape regulation merely because of their form of organization."

We have pointed out earlier in this brief the comparatively few types of commodities that are shipped by air and that if a shippers' association were to be formed under the guise of a nonprofit undertaking

by shippers of each of the various types of commodities, it would not be long before regulated air freight forwarders would be out of business. The Board (Tr. p. 404) states:

> "Should the concept of associations of shippers spread, as it doubtless would were we to exempt Bay Area, the impact upon the air forwarding industry might well be disastrous."

The Board, of course, is concerned with the public interest as it must be under the declaration of policy contained in the Act (Section 2) (49 U. S. Code 402) and undoubtedly Docket 5947 will determine the extent to which the public interest requires regulation or nonregulation of shippers' associations.

In *W. R. Grace & Company v. C. A. B.*, 154 F. 2d 271, the Court of Appeals for the Second Circuit stated:

> "With increasing emphasis, the Supreme Court has admonished us that, in court review of such administrative orders as this now before us, the public interest looms large."

So far as industry harm is concerned, it would seem that if all flower shippers were placed on a fair competitive basis it would follow that the entire industry should benefit rather than suffer. If in such a case the demand for flowers in the eastern markets falls below the supply, there would be an equal possibility of survival among all of the flower shippers. If the cease and desist order does not become effective for an indefinite period and the Bay Area members remain in a preferred position, then the chance of

survival would be heavily against that portion of the industry which is outside the membership of Bay Area.

Under the Administrative Procedure Act (5 U. S. Code 1009(e)), (60 Stat. 243), a reviewing Court may hold unlawful and set aside agency action, findings and conclusions found to be arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. Certainly a review of this record does not indicate that the Board was arbitrary or capricious or that it abused its discretion. No procedural violations are alleged nor is there an attack made on any of the findings set forth in the Board order refusing the requested stay of the cease and desist order. It is really only a question as to whether the Board was reasonable and whether its order was a rational conclusion and not so unreasonable as to be capricious, arbitrary or abuse of discretion. (*Willapoint Oysters v. Ewing,* 174 F. 2d 676.)

The action of the Board in refusing the stay requested was purely discretionary and the Board did not abuse its discretion in denying the request.

It is respectfully submitted that the Board order or orders under review be affirmed.

Dated, San Francisco, California,
March 1, 1954.

PAUL T. WOLF,
Attorney for Airborne Flower and Freight Traffic, Inc., Respondent.

No. 13727

In the United States Court of Appeals for the Ninth Circuit

CONSOLIDATED FLOWER SHIPMENTS, INC.—BAY AREA,
PETITIONER

v.

CIVIL AERONAUTICS BOARD AND AIRBORNE FLOWER AND FREIGHT TRAFFIC, INC., RESPONDENTS

BRIEF FOR THE RESPONDENT CIVIL AERONAUTICS BOARD

STANLEY N. BARNES,
Assistant Attorney General.
RALPH S. SPRITZER,
Special Assistant to the Attorney General.
JOHN H. WANNER,
Associate General Counsel, Civil Aeronautics Board.
EMORY T. NUNNELEY, Jr.,
General Counsel,
JAMES L. HIGHSAW, Jr.,
Chief, Litigation and Research Division,
O. D. OZMENT,
HENRY M. SWITKAY,
Attorneys,
Civil Aeronautics Board.

INDEX

CITATIONS

Cases—Continued

Cases—Continued

In the United States Court of Appeals for the Ninth Circuit

No. 13727

CONSOLIDATED FLOWER SHIPMENTS, INC.—BAY AREA, PETITIONER

v.

CIVIL AERONAUTICS BOARD AND AIRBORNE FLOWER AND FREIGHT TRAFFIC, INC., RESPONDENTS

BRIEF FOR THE RESPONDENT CIVIL AERONAUTICS BOARD

JURISDICTIONAL STATEMENT

The jurisdiction of the Civil Aeronautics Board to issue the orders under review rests on Sections 205, 401, and 1002 of the Civil Aeronautics Act of 1938, 52 Stat. 973, as amended, 49 U. S. C. 401 et seq., and was invoked upon the Board's own initiative (R. 3), and by a complaint filed by the respondent Airborne Flower and Freight Traffic, Inc. (See Tr. 40.)[1] The jurisdiction of this Court to review these orders rests on Section 1006 of the Act (52 Stat. 1024, 49 U. S. C. 646), and was invoked by a motion made and granted for leave to file a petition for review out of time after

[1] The reference Tr. is to the unprinted transcript of record herein, and the reference R. is to the printed transcript of record. It has been stipulated by the parties to the case, with the Court's approval, that the exhibits in the Board's proceeding, which were not printed, may be referred to on brief as if printed (R. 424).

an earlier petition for review had been dismissed for want of timely filing. *Consolidated Flower Shipments, Inc.—Bay Area* v. *Civil Aeronautics Board,* 205 F. 2d 449 (R. 421).

COUNTERSTATEMENT OF THE CASE

Petitioner is a so-called "nonprofit" organization engaged in the consolidation and shipment by air freight of flowers and decorative greens on behalf of its membership from the San Francisco area to eastern markets, and on behalf of the members' consignees. Its activities have been determined by the Board to constitute air transportation operations requiring appropriate authority from the Board under the provisions of the Civil Aeronautics Act. Although it could obtain a license from the Board as an air freight forwarder, petitioner has elected not to do so. It seeks review of a Board order (R. 389) directing it to cease and desist from engaging in unauthorized air transportation, and of a subsequent Board order (R. 396) refusing to stay the effectiveness of the cease and desist order until after the completion of Board proceedings in a general investigation which encompasses, *inter alia,* the question of whether special exemption should be granted from the Act for forwarding activities such as those conducted by petitioner. For a full understanding of the Board's orders and the positions of the parties, it is necessary briefly to review the statutory basis and the factual background of the Board's proceedings and actions.

Section 1 (2) of the Civil Aeronautics Act (*infra,* p. 37) defines an "air carrier" as one "who under-

takes, whether directly or indirectly or by lease or any other arrangement, to engage in air transportation." "Air transportation" in turn is defined in part (sections 1 (10) and 1 (21), *infra,* p. 37) as the "carriage by aircraft of persons or property as a common carrier for compensation or hire * * *." Under these definitions, air carriers include not only those persons who operate aircraft, but also those "indirect" air carriers who undertake to perform or provide common carrier transportation services through the use of the services of the direct air carriers. In short, express companies, freight forwarders, and other common carrier service organizations are included within the coverage of the Act.[2]

Section 401 (a) (*infra,* p. 38) prohibits air carrier operations in the absence of a certificate of public convenience and necessity issued by the Board after public hearing. However, Section 1 (2) also provides "[t]hat the Board may by order relieve air carriers who are not directly engaged in the operation of aircraft in air transportation from the provisions of this Act to the extent and for such periods as may be in the public interest" (*infra,* p. 37). Pursuant to this proviso, the Board in 1948 promulgated a regulation (14 C. F. R. 296) which exempts "air freight forwarders" as defined therein from the provisions of Section 401 (a). *Air Freight Forwarder*

[2] See *National Air Freight Forwarding Corp.* v. *Civil Aeronautics Board*, 90 U. S. App. D. C. 330, 197 F. 2d 384 (1952); *American Airlines* v. *Civil Aeronautics Board*, 178 F. 2d 903 (C. A. 7, 1949); *Railway Express Agency, Grandfather Certificate*, 2 C. A. B. 531 (1941); *Universal Air, Investigation of Forwarding Activities*, 3 C. A. B. 698 (1942).

case, 9 C. A. B. 473 (1948), affirmed, *American Airlines* v. *Civil Aeronautics Board,* 178 F. 2d 903 (C. A. 7, 1949). Persons desiring to avail themselves of the exemption privilege are required to make application to the Board for a "Letter of Registration" as an air freight forwarder. Upon an appropriate showing of certain minimum qualifications, a Letter of Registration may be issued without hearing or other formal proceedings. Persons obtaining such Letters of Registration are required to carry liability insurance for the protection of their customers. They also are subject to various regulatory provisions of the Act, including the requirement that they file and observe tariffs (Section 403, 49 U. S. C. 483).

Petitioner conceded before the Board, and concedes here (Br. p. 1), that the services performed on behalf of its membership are not different from those which are provided by air freight forwarders.[3] Those services and petitioner's method of operation may be described as follows:

An "Executive-Secretary" who also is a trucker is employed in the San Francisco area for the purpose of collecting individual boxes of flowers for shipment

[3] The Board's regulation provides exemption for a forwarder of property (14 C. F. R. 296.1)

"which, in the ordinary and usual course of his undertaking, (a) assembles and consolidates or provides for assembling and consolidating such property and performs or provides for the performance of break-bulk and distributing operations with respect to such consolidated shipments, (b) assumes responsibility for the transportation of such property from the point of receipt to point of destination, and (c) utilizes for the whole or any part of the transportation of such shipments, the services of a direct air carrier subject to the Act."

by air (R. 15, 323), and an office is maintained at the airport by the trucker-agent in the name of the petitioner (R. 15, 16, 33). The boxes of the individual members are picked up and brought to the airport by the trucker-agent, where boxes destined for the same or adjacent localities are consolidated by him for shipment (R. 18, 205, 206). The flowers are then consigned in petitioner's name to another agent at the distribution point, with the freight charges to be collected from the agent consignee by the air carrier (R. 104, 105, 318, 319). There is also collected from the agent consignee an "advance charge", presently sixty cents for each box of flowers in the consolidated shipment (R. 18, 19, 273, 317). This sum is remitted by the air carrier to petitioner's trucker-agent in San Francisco. Fifty-five cents of the advance charge on each box is retained by him as payment for his services and office expenses (R. 19, 273) and five cents is turned over to petitioner for use in defraying certain association expenses, including a part of the office expenses (R. 273).

The agent at the distribution point "breaks" the bulk shipment for distribution to the ultimate individual consignees, sometimes performing beyond-routing (280, 319, 320). He prorates the shipping charges between the individual consignees, and collects from them the prorated cost of transportation, plus the sixty cents advance charge for each box and whatever delivery fee is due him (Tr. 602, 629–633, R. 566).

The flowers which are shipped in this manner are either direct sales to the ultimate consignee, or are

290905—54——2

shipped on "consignment." In the case of consignments, the florist accepting the shipment undertakes to sell the flowers on commission for the shipper. The florist deducts his commission and the freight and advance charges from the proceeds of the sales, and remits the balance to the shipper (R. 181–183, 349). Where the shipment is a direct sale, the purchaser or ultimate consignee bears the freight and advance charges (R. 476). Thus, the member of petitioner's association who shipped the flowers bears the expense of shipment in the case of consignments (R. 349), whereas the ultimate consignee bears the expense in the case of outright sales (R. 476).

These consolidation and forwarding services are available only with respect to flowers shipped by the members of Bay Area, and Bay Area disclaims any responsibility to its members for loss or damage in shipments. The Board found on the basis of evidence hereinafter set forth (*infra,* pp. 13 to 16) that membership in petitioner is for the purpose of obtaining these services, and that membership is held out and is available to all growers and shippers in the San Francisco area (Board Report E–7139, *infra,* pp. 42, 63).[4] The services performed were determined by ~~its~~ the Board to be for "compensation" within the meaning of the Act (Report E–7139, *infra,* p. 43). Holding that petitioner could not alter its status by entering into agreements disclaiming carrier responsibility, the Board concluded that the activities were those of a common carrier and hence those of an

[4] The Board's report was not included in the printed record, and is set forth in its entirety as Appendix B to this brief.

indirect air carrier (Report E–7139, *infra,* p. 43). The Board also found that the operations were those of an indirect air carrier upon the additional ground that petitioner's services were held out and were available to any consignee who purchased flowers from a shipper member (Report E–7639, *infra,* p. 43). Accordingly, the Board ordered petitioner to cease and desist from engaging in its unauthorized activities.

During the course of the Board's proceeding, petitioner had sought a special exemption from the Act for its operations, and action on this application had been deferred pending a determination of petitioner's status (see R. 392). Concurrently with the issuance of the cease and desist order, the Board denied the exemption application (R. 390). Since the freight forwarder regulation was soon due to expire, the Board also instituted on the same day a general investigation into the problem of whether the regulation should be renewed and whether additional classifications of indirect property carriers should be established and additional exemption authority should be granted (*Air Freight Forwarder Investigation* case, C. A. B. Docket 5947, R. 406).

In denying petitioner's exemption application, the Board found that the application raised complex and controversial questions best determined only after full public hearing (R. 392), that the granting of exemptions such as requested by petitioner "might well lead to the demoralization and consequent destruction of the registered air freight forward industry" (R. 393), and that the Board consistently had refused to sanction unauthorized forwarding activities by shippers'

associations (R. 393). It pointed out that the *Air Freight Forwarder Investigation* afforded an appropriate forum for a determination of whether a special exemption should be granted to petitioner (R. 393), that petitioner was at liberty to file an application therein (R. 394), and that it was not in the public interest to grant an exemption at this time (R. 393).

Petitioner then sought reconsideration of the Board's actions, requesting, *inter alia,* that the Board stay the effective date of the cease and desist order until after completion of the proceedings in the *Air Freight Forwarder Investigation.* By supplemental opinion (R. 396), the Board declined to stay its order. It pointed out that petitioner could obtain a Letter of Registration and operate as an air freight forwarder without any undue burden and without making any substantial changes in its method of operations (R. 400–402). The Board again found that to permit petitioner to operate outside the regulatory framework of the Act would be contrary to the public interest in that similar treatment would be required for other such organizations, with possible disastrous consequences to the existing regulated industry and a resulting loss to the public and the direct air carriers of the services performed and traffic generated by authorized forwarders (R. 404–405).

STATUTES AND REGULATIONS INVOLVED

The principal provisions of the Civil Aeronautics Act here involved are set forth in Appendix A hereto (*infra,* p. 37). The Board's regulations governing

air freight forwarders appear in 14 Code Fed. Reg. 296.

QUESTIONS PRESENTED

In our view, the questions which are dispositive of this case are:

1. Whether the Board's findings that petitioner is an indirect air carrier are supported by substantial evidence.

2. Whether the cease and desist order entered by the Board is sufficiently definite in its terms.

3. Whether the Board's alleged abuse of discretion in refusing to suspend the effectiveness of the cease and desist order presents an issue appropriate for judicial determination, and, if so, whether any abuse of discretion has been shown.

SUMMARY OF ARGUMENT

Petitioner exists for the purpose of providing air forwarding services. Its services are available to any grower or shipper of flowers in the San Francisco area willing to become a member of petitioner, and the only purpose of membership is to obtain the transportation services. Membership is actively solicited, and no person has ever been refused admittance.

These findings by the Board, supported by substantial evidence, plainly establish petitioner's activities to be those of a common carrier in relation to its membership. Petitioner holds out its services to the entire public which ships flowers from the San Francisco area. The law is clear that neither common carrier status nor regulatory statutes may be avoided through the device of interposing a member-

ship requirement as a condition precedent to obtaining transportation services. Equally clear is the fact that petitioner's claim of private carriage by analogy to "contract" operations is groundless. A "contract carrier" willing to contract, within the limits of its facilities, with all who meet its terms is a common carrier.

The Board's alternate finding of common carriage through petitioner's holding out and providing forwarding services for consignees also is supported by the facts and the law. The consignee who pays the charges is the purchaser of the transportation services, and petitioner's services are held out and available to all persons electing to do business with petitioner's membership.

Petitioner is unaided by the case of *United States* v. *Pacific Coast Wholesalers Association,* 338 U. S. 689 (1950). That case dealt only with the question of whether the operations there involved fell within the specific exemption contained in Part IV of the Interstate Commerce Act for "nonprofit" shippers organizations. There is no such exemption in the Civil Aeronautics Act, and the *Pacific Wholesalers* case does not purport to alter the established rule that so-called "nonprofit" organizations do not differ from any other form of corporate entity insofar as the question of common carriage is concerned.

II

The Board carefully reviewed petitioner's activities in its report, fully disclosing both the factual and legal basis for its determination of common carriage.

That report is incorporated in the cease and desist order, and affords adequate guidance to petitioner. It is impossible to formulate a precise order delineating a hard and fast rule for determining common carriage, and no greater specificity in the Board's order was appropriate or required. *Brady Transfer & Storage Co.* v. *United States,* 80 F. Supp. 110 (S. D. Iowa, 1948), affirmed, *per curiam,* 335 U. S. 875 (1948).

III

This Court will have exhausted its function after reviewing the Board's order on the merits. The question of whether the Board should suspend a valid order for reasons of transportation policy is not appropriate for judicial determination; it involves a purely administrative matter committed to the exclusive discretion of the Board. In any event, however, the Board plainly did not abuse its discretion in refusing to suspend its order for the lengthy period of time necessary to finally determine the *Air Freight Forwarder Investigation* case. There is no reason to believe that petitioner, as a result of that proceeding, will be permitted to operate entirely outside the framework of the Act, and the Board pointed out that petitioner can operate as a licensed air freight forwarder with little burden. Operation within the regulatory framework by petitioner and other similar organizations is required for the protection of the public and the regulated industry.

ARGUMENT

I. The Board correctly determined petitioner's status to be that of an indirect air carrier

Whether petitioner is an indirect air carrier within the meaning of the Civil Aeronautics Act depends on whether petitioner's forwarding activities are those of a "common carrier" (see Section 1 (21), *infra,* p. 37). The Board determined petitioner to be a common carrier, primarily on the ground that petitioner's transportation services are held out and available through membership to all growers and shippers of flowers in the San Francisco area, and on the secondary ground that its services are held out and available to all persons who purchase flowers from petitioner's membership.

The determination of whether a person is a common carrier is primarily one of fact in the light of applicable case law. 13 CJS Carriers § 3 (a). The Court's inquiry at this stage of the case accordingly is whether the Board's factual findings are supported by "substantial evidence" (Section 1006 (e), *infra,* p. 39), and whether, in the light of the facts found, the Board properly concluded that petitioner was a common carrier.[5] We demonstrate hereinafter that the record supports the Board's factual findings, and that petitioner is a common carrier in the light of applicable case law.

[5] Indeed, it has been held that whether one is a common carrier is a question of ultimate fact. *Haynes* v. *MacFarlane*, 207 Calif. 529, 279 P. 436 (1929); cf. *Fleming* v. *Chicago Cartage Co.*, 160 F. 2d 992 (C. A. 7, 1947).

A. The Board's findings that petitioner's transportation services are held out and available through membership to all growers and shippers in the San Francisco area, and that its services are held out and available to all persons who purchase flowers from petitioner's membership, are supported by substantial evidence

Petitioner was organized and exists for the primary purpose of affording reduced-rate transportation to growers and shippers of flowers in the San Francisco area and to their customers in Eastern markets (R. 140, 209, 473, 563). It was organized largely by a motor trucker (R. 12, 67, 215), and has continued in business principally through the efforts of another trucker, who presently serves as "Executive-Secretary" of petitioner. As previously indicated (*supra,* p. 5), the record discloses that operating expenses are paid almost entirely from the flat fee assessed against each box of flowers handled, and the difference is retained by the trucker-agent as his compensation or profit.

Only those flowers which are tendered by persons holding membership in petitioner are consolidated and forwarded by petitioner. However, the members are in competition with each other (R. 217, 507, 508), are not obligated to use Bay Area's services (R. 219, 300), and in fact quite frequently use the services of other forwarders (R. 177, 196, 218, 469). As the Board found, the purpose of membership is to obtain the transportation services.[6]

[6] Petitioner attempted to establish before the Board that services other than transportation services were rendered to the membership. So far as the record reveals, the only other service is to call the Weather Bureau (which the members can do equally well) and to relay the weather report to the members (see R. 188, 437, 444, 456).

290905—54——3

It is obvious, of course, that the profits of the trucker-agent will increase with increased membership. Equally obvious is the fact that the transportation costs for the individual boxes of flowers will decrease as the volume of shipments increase since those costs are assessed on a *pro rata* basis in relation to the entire consolidated shipment (cf. R. 242, 433, 563). Under these circumstances, intensive efforts have been made by both the trucker-agent and individual members of petitioner to secure additional members and business.

The evidence shows that membership was, and so far as this record discloses still is, "open to anyone" in the San Francisco area qualifying as a grower or shipper (R. 214, see, also R. 143, 227).[7] Efforts (both by personal solicitation on the part of the trucker-agent and by word-of-mouth representations of the members) have been made to bring all growers and shippers in the area into the organization (R. 12, 13, 47, 120, 154, 267, 268, 495, 504). Indeed, Mr. Barulich, the present trucker-agent or "Executive Secretary" was first employed as a "sales and public relations man" (R. 267), whose duties, for almost a year, were the solicitation of membership in petitioner and the soliciting of persons to ship via petitioner (R. 267, 268, Appendix B, p. 52, *infra.*). While some members have been dropped for nonpayment of dues (R. 243, Appendix B, p. 58, *infra*), membership has

[7] The minutes of one of petitioner's meetings states: "The Board of Directors was instructed to accept anyone in the consolidation, as it would help in lower prices per box." Enforcement Attorney's Exhibit 329, Tr. 2053.

never been refused to any grower or shipper in the area (R. 214, 299).[8]

Additional attempts to obtain members and business is disclosed by the petitioner's efforts to have Eastern florists request their shippers to utilize Bay Area's services. Letters have been sent to Eastern dealers asking that they request the use of petitioner's services (R. 253), and personal contact has been made with such dealers for the same purpose (R. 290–297, 301–306). Numerous requests for Bay Area service have in fact been received by various shippers as a

[8] Annual dues were not assessed until after the institution of the Board's proceeding in 1951 (R. 3), and then in the nominal amount of $50 (R. 300, 244), primarily for the purpose of defraying the expenses incident to the Board's proceeding (see Appendix B, p. 58, *infra*).

After institution of the Board's proceeding, other changes also followed. A "contract of employment" between petitioner and Mr. Barulich, the trucker-agent, was entered into whereby Barulich became the "Executive Secretary" of petitioner with a guaranteed minimum salary of $5,000 (Enforcement Attorney's Exhibit No. 389, Tr. 2130). However, the profit from the pickup and the consolidation charges has yielded Mr. Barulich more than this guaranteed amount, and no salary has in fact been paid to him (see R. 290). Various changes in accounting methods and the allocation of portions of the flat fee charged for each box between "pickup" and "consolidation" charges also have been made, including an allocation of 5 cents per box to petitioner to defray "consolidation expenses" (see R. 271–273, 277, 321).

These changes appear to have been made in an effort on the part of the trucker-agent to avoid carrier status. Interestingly enough, however, Mr. Barulich described himself, in October 1951, as self-employed and as engaging in the "air freight forwarding" business (R. 307). Although charged with unauthorized freight forwarding activities by the Board's Office of Enforcement, the Board made no determination of Barulich's status, holding that the cease and desist order entered would run against him as petitioner's agent (Appendix B, p. 44, *infra*).

result of these efforts (R. 46, 50, 118, 148, 149, 150, 177, 178, 197, 239, 243).

Another part of the publicity campaign has involved direct advertising. This was accomplished by the use of stickers "to be made up and bought by the members to be placed either on each box or bill, building up sales for the group air shipments" (Enforcement Attorney's Exhibit 315, Tr. 2043). Manifests to be used by the members were ordered by Bay Area and showed the Bay Area name (Enforcement Attorney's Exhibit 237, Tr. 1965). An affiliate membership was secured with the Society of American Florists (Enforcement Attorney's Exhibit 337, Tr. 2061), which is primarily a cooperative advertising organization. Advertising was also pursued in the San Francisco area by having the Bay Area name lettered on the trucks used for pickup and delivery (Enforcement Attorney's Exhibit 166–770, 330, 359, Tr. 1894–1898, 2054, 2083), by having a Bay Area telephone listing (Enforcement Attorney's Exhibit 180, Tr. 1909), and by using Bay Area letterheads and envelopes (Enforcement Attorney's Exhibit 175, 179, Tr. 1903, 1908).

In short, the record admits of no conclusions other than that petitioner's services are held out and are available through membership to all growers and shippers in the San Francisco area, and are directly held out and available to all persons who do business with the members. Petitioner's penetration of the San Francisco market has been substantial. While its membership has never exceeded twenty-six at any one time (out of a total number of potential flower

shippers in the area variously estimated as fifty (R. 144), one hundred or more (R. 467), and two hundred and twenty-nine (R. 519)), it claims to handle over 50% of the flowers shipped from the San Francisco area (Br. p. 31), and its services are available to some 750 individual consignees. Its failure to occupy the entire field is not due to lack of effort on its part, but simply to an inability to obtain all the business despite those efforts.

B. Petitioner's activities are those of a "common carrier"

Upon the basis of the foregoing findings, petitioner plainly is a common carrier. Petitioner erroneously supposes that, because it limits its activities to powers and its services to its members and their patrons, common carrier status is thereby avoided. Numerous common carriers, particularly in the motor carrier field, limit their services to particular commodities. See e. g., *Alton R. Co.* v. *United States,* 315 U. S. 15 (1942); *Bowles* v. *Wieter,* 65 F. Supp. 359 (E. D. Ill., 1946); *Affiliated Service Corp.* v. *P. U. C.,* 127 Ohio St. 47, 186 N. E. 703 (1933). Moreover, there is no requirement that one must hold himself out to serve each and every member of the public before he may be a common carrier. Admittedly, there must be a "holding out" to serve the "public," but "[t]he public does not mean everybody all of the time." *Terminal Taxicab Co.* v. *Kutz,* 241 U. S. 252, 255 (1916). It is enough if the service is held out to those members of the public who have need for it. E. g., *Terminal Taxicab Co.* v. *Kutz, supra; Producers Transportation Co.* v. *Railroad Commis-*

sion, 251 U. S. 228 (1920); *Fleming* v. *Chicago Cartage Co.,* 160 F. 2d 992 (C. A. 7, 1947); *Alaska Air Transport* v. *Alaska Airplane Charter Co.,* 72 F. Supp. 609 (D. C. Alaska, 1947); *State* v. *Witthaus,* 340 Mo. 1004, 102 S. W. 2d 99 (1937); *Affiliated Service Corp.* v. *Public Utilities Commission,* 127 Ohio St. 47, 186 N. E. 703 (1933); *In Re Pacific Motor Transport Company,* 38 Calif. R. C. R. 874 (1933).

An application of this settled principle to the facts of record establishes beyond doubt that petitioner's activities are those of a common carrier. Viewing only its activities in the San Francisco area, petitioner holds out its transportation service by offering membership, both expressly and by course of conduct, to all growers and shippers in the area, the entire "public" involved.[9] Although membership is a prerequisite, petitioner through this familiar device can avoid neither the status of a common carrier nor the regula-

[9] Assuming that petitioner's recent incorporation under the California Agricultural Code may have the effect of limiting its membership only to growers, as distinguished from wholesalers who do not themselves raise flowers, its services are still available through membership to all of that portion of the public which engages in flower production, and compels no result different from that reached by the Board.

Petitioner's various contentions with respect to its inability to serve "the public" because of limitations in its corporate charter are irrelevant. In the first place, petitioner's charter permits and contemplates that all growers are to be served. More importantly, "whether a transportation agency is a common carrier depends not upon its corporate charter or declared purposes, but upon what it does." *United States* v. *California,* 297 U. S. 175, 181 (1936). It is only reasonable to assume that petitioner would have requested the Board to reopen the record to receive evidence of changes in petitioner's activities resulting from its reincorporation if any changes have in fact occurred.

tory requirements of the Civil Aeronautics Act. E. g., *West* v. *Tidewater Express Lines,* 168 Md. 581, 179A. 176 (1935); *Davis* v. *People,* 79 Colo. 642, 247 P. 801 (1926); *Affiliated Service Corp.* v. *Public Utilities Commission, supra; North Shore F. & F. Co.* v. *North Shore B. Men's T. Assn.,* 195 Minn. 336, 263 N. W. 98 (1935); *Natural Gas Service Co.* v. *Serv-YU Cooperative,* 70 Ariz. 235, 219 P. 2d 324 (1950); *State* v. *Rosenstein,* 217 Iowa 985, 252 N. W. 251 (1934); *Motor Freight Terminal Co.* v. *Burke,* PUR 1932 C, 72 (Cal. R. R. C.).

In apparent recognition of this fact, petitioner seeks to analogize its activities to those of a "contract carrier." Assuming that limiting service to members is analogous to limiting service to signatories of contracts, petitioner is not benefited thereby. If a carrier is willing to contract within the limits of its facilities with all persons who meet its terms, it is a common carrier. *Producers Transportation Co.* v. *Railroad Commission,* 251 U. S. 228 (1920); *Cornell Steamboat Co.* v. *United States,* 53 F. Supp. 349 (S. D. N. Y., 1943), affd., 321 U. S. 634 (1944); *Alaska Air Transport* v. *Alaska Airplane Charter Co.,* 72 F. Supp. 609 (D. C. Alaska, 1947); *Fordham Bus Co.* v. *United States,* 41 F. Supp. 712 (S. D. N. Y., 1941); *Bingaman* v. *Public Service Commission,* 161 A. 892 (Pa. Super., 1932); *Breuer* v. *Public Utilities Commission,* 118 Ohio St. 95, 160 N. E. 623 (1928); *Haynes* v. *MacFarlane,* 207 Calif. 529, 279 P. 436 (1929).

Petitioner's reliance upon Interstate Commerce decisions relating to "contract carriers" and the various tests devised by that agency for differentiating be-

tween "common" and "contract" carriers in doubtful cases is wholly misplaced. A reading of the various Commission cases relied upon by petitioner in its brief will readily disclose that the Commission, in common with the courts and other regulatory agencies, recognizes that the ultimate test of common carriage is whether there is a "holding out" or "offer" to serve the public generally as those terms are defined by applicable case law. See *Craig Contract Carrier Application,* 31 M. C. C. 705, 708–710 (1941). Where there is no direct holding out or stated willingness to serve the public, the Commission necessarily must resort to what it terms "subordinate or secondary tests" to determine whether there is in fact an offer of public service. These secondary tests include the so-called "specialization test," whereby the using of highly specialized equipment and the serving of only a few customers under long-term stable arrangements may serve to negative a public offering of service through course of conduct. A closely related secondary test is the form of contracts employed, and the Commission generally regards as "contract" or noncommon carriers only those persons who perform services under a few stable long-term written contracts which bind the shipper to tender and the carrier to transport the commodity involved. *Contracts of Contract Carriers,* 1 M. C. C. 628 (1937).[10]

As indicated, these secondary tests are applied only where the carrier's status is not otherwise clear.

[10] This view on the part of the Commission has received specific judicial approval. *Fordham Bus Corp.* v. *United States*, 41 F. Supp. 712, 718 (S. D. N. Y. (1941)).

Here there is no need for resort to any secondary test; petitioner's offer to serve the public is express. Nonetheless, if petitioner's solicitation of membership and business is disregarded, its activities plainly are still those of a common carrier under an application of the secondary tests upon which it relies.

With respect to the "specialization" test, it is obvious that petitioner's equipment is not highly specialized. And if it were, that fact still would not preclude common carrier status. It is common knowledge that a substantial part of the common carrier industry is devoted to providing services in special equipment such as refrigerator cars and trucks, tank cars, pipelines, special vehicles for the transportation of livestock, explosives, and the like. Nor is there any basis for petitioner's claim that it performs a highly specialized service which is in reality a part of the organization of each individual shipper. Indeed, petitioner concedes that its services are similar to those afforded by any other freight forwarder (Br. p. 1). The transportation of flowers obviously requires no greater skill and knowledge than does the transportation of any other perishable commodity. True, petitioner may observe the shippers' hours of loading and unloading (Br. p. 15). But as the Interstate Commerce Commission has held, even unusual catering to "the desires of * * * shippers as to the loading and unloading hours is no more than good business and efficient management. It is not alone enough to establish any bona fide specialization * * *." *Transportation Activities of Midwest Transfer Co.,* 49

M. C. C. 383, 398 (1949). See, also, *Fleming* v. *Chicago Cartage Co.,* 160 F. 2d 992, 996, 997 (C. A. 7, 1947); *Pregler Extension of Operation,* 23 M. C. C. 691, 695 (1940); *Bush Construction Co.* v. *Platten,* 48 M. C. C. 155, 162 (1948).

Further, even assuming that petitioner's activities are highly specialized in terms of equipment and services, there is plainly no specialization in the sense of a devotion of its efforts to a very limited number of shippers. Petitioner's shippers are restricted only by the number of persons having need for its services and its own inability to obtain more members despite its best efforts. The secondary tests of mutually binding long-term contracts, or of a stable number of shippers, plainly are not met. See *Contracts of Contract Carriers,* 1 M. C. C. 628 (1937). As the Commission has pointed out (*Transportation Activities of Midwest Transfer Co.,* 49 M. C. C. 383, 397 (1949)):

> * * * specialization in respect of shippers served is evidenced or negatived by the number served, by the apparent ease or reluctance with which new contracts (shippers) are added either in replacement of lost accounts or in addition to accounts already served.[11]

Here, there are no mutually binding arrangements between petitioner and its membership. There is no obligation to tender traffic, and the members in fact use the services of other forwarders (see *supra,* p. 13). Membership is shifting, with new members being

[11] Petitioner erroneously imputes this quotation (Br. p. 14) to the subsequent *Midwest* Case reported at 52 M. C. C. 33.

added and old ones dropping out.[12] Insofar as the secondary tests are concerned, petitioner's situation resembles that described in *Producers Transportation Co.* v. *Railroad Commission,* 251 U. S. 228, 232 (1920), as follows:

> Looking through the maze of contracts, agency agreements and the like, under which the transportation was effected, subordinating form to substance, and having due regard to the agency's ready admission of new members and its exclusion of none, it was apparent that the Company did in truth carry oil for all producers seeking its service, in other words, for the public.

We also note petitioner's apparent contention that common carrier status is avoided through its disclaimer of responsibility to its members for loss or damage to shipments (Br. pp. 21, 22). However, as the Board pointed out (Appendix B, *infra,* p. 43), a carrier cannot divest itself of carrier status through this expedient. *Bank of Kentucky* v. *Adams Ex. Co.,* 93 U. S. 174, 180–181 (1876); *Railroad Company* v. *Lockwood,* 17 Wall. (84 U. S.) 357, 376 (1873). As stated in *Liverpool Steam Co.* v. *Phenix Ins. Co.,* 129 U. S. 397, 440 (1889):

> A common carrier is such by virtue of his occupation, not by virtue of the responsibilities

[12] The fluctuating membership of petitioner (R. 219, 220, Enforcement Attorney's Exhibit 391, Tr. 2136) is in sharp contrast to cases involving stable relationships such as *Ace High Dresses* v. *L. C. Trucking Co.*, 122 Conn. 578, 191A. 536 (1937), also relied upon by petitioner. There the number of long-term contracts had dwindled from eight to five, and there was no holding out of contractual services to the public.

> under which he rests. * * * A carrier who stipulates not to be bound to the exercise of care and diligence seeks to put off the essential duties of his employment.[13]

Turning now to the alternate finding by the Board of common carrier status because of the services held out and afforded to the customers of petitioner's membership, we think petitioner's status to be equally clear. There is no question here involved of *bona fide* shipment by petitioner of its own goods. Petitioner is engaged solely in the transportation business, and employs the familiar freight forwarder technique of advertising its services to consignees. The services are held out and are available to all that public which purchases flowers from the members. True, the

---

[13] Petitioner's specific contention appears to be that an "air freight forwarder" under the Board's regulation is restricted to a person who *voluntarily* assumes responsibility for shipments. Actually the Board did not find petitioner to be an "air freight forwarder," but rather an "indirect air carrier." However, a person who actually forwards for the public, as does petitioner, assumes responsibility for its shipments as a matter of law. *Republic Carloading & Distributing Co., Inc. Freight Forwarder Application*, 250 I. C. C. 670 (1943). See also, *W. J. Byrnes & Co., Freight Forwarder Application*, 260 I. C. C. 55 (1943). *Vendors Consolidating Co., Freight Forwarder Application*, 265 I. C. C. 719, 724 (1950).

Moreover, petitioner recognizes its responsibility to its patrons. Prior to the enforcement proceeding it carried a policy of insurance against all risks of loss or damage to cargo carried by it (R. 402, Enforcement Attorney's Exhibits 352, 353, Tr. 2076, 2077). It currently carries motor carrier cargo liability insurance, purchases excess valuation for consolidated shipments from the direct air carrier, processes claims for loss and damage, and settles such claims on Bay Area's checks (R. 307, 315, 326, 327, 401, 402, 443).

source of supply is limited to the flowers of the membership. But the case in this respect is no different from that in which the source of patronage is restricted to the guests of a hotel (*Terminal Taxicab Co.* v. *Kutz,* 241 U. S. 252 (1916)), or from the familiar cases in which persons attempt to avoid the impact of regulatory statutes by buying goods and then selling them substantially at cost, plus transportation charges, to any person willing to buy. See e. g., *A. W. Stickle Co.* v. *Interstate Commerce Commission,* 128 F. 2d 155 (C. A. 10, 1942), cert. den., 317 U. S. 650 (1942). The Interstate Commerce Commission holds that freight forwarders whose business is derived substantially or in part from solicitation of consignees fall within the regulatory provisions of the Interstate Commerce Act. *Kelly Freight Forwarder Application,* 260 I. C. C. 315, 317–319 (1944); *Twin Cities Shippers Assn. Freight Forwarder Application,* 260 I. C. C. 307, 308 (1944); cf. *W. J. Byrnes & Co. of New York, Inc., F. F. Application,* 260 I. C. C. 55 (1943).[14] Petitioner claims that a different rule should apply here because the shipper often utilmately bears the transportation cost. However, petitioner is a stranger to that aspect of the arrangement between the shipper and the consignee. The consignee always pays the charges in the first instance, and accordingly

[14] For other situations in which persons have been held to be common carriers because of their relationships to consignees, see *Interstate Commerce Commission* v. *Pickard,* 42 F. Supp. 351 (W. D. N. Y., 1941); *Toussaint Contract Carrier Application,* 41 M. C. C. 459 (1942); *Phillips Packing Co., Common Carrier Application,* 260 I. C. C. 297 (1944).

is the purchaser for transportation purposes. *Adams* v. *Mills,* 286 U. S. 397 (1932).[15]

In this aspect of the case, petitioner places primary reliance upon the decision in *United States* v. *Pacific Coast Wholesalers,* 338 U. S. 689 (1950). Indeed, petitioner contended in effect before the Board, and suggests here, that this decision is wholly controlling and establishes that an organization such as petitioner cannot be regarded as a common carrier. But the *Pacific Coast Wholesalers* case dealt with the single question of whether the nonprofit organization there involved was entitled to the benefit of the specific statutory exemption in the Freight Forwarder Act for "the operation of a shipper, or a group or association of shippers, in consolidating or distributing freight for themselves or for the members thereof, on a nonprofit basis, for the purpose of receiving the benefits of carload, truckload, or other volume rates" (Part IV, Interstate Commerce Act, Sec. 402 (c), 49 U. S. C. 1002 (c)). In determining that the organization was entitled to the exemption, the Court held its "nonprofit" status to be unaltered by reason of the handling of shipments consigned to members

[15] Even if it be thought that a different rule should prevail in cases in which the member shipper ultimately bears the cost, petitioner still affords a substantial amount of service to consignees alone. According to petitioner's own estimate, 32% of the shipments represent direct sales to consignees where the shipping charges and consolidation fees are not charged back to the shipper. If petitioner does handle over 50% of the flowers moving from the area, as it asserts, then 16% of all area flower shipments are at the direct expense of the consignees, an amount plainly not *de minimis.*

in cases where the seller paid the transportation charges.

There is no problem presented in this case of whether petitioner would be entitled to the benefit of an exemption for "nonprofit" operations. No such exemption is contained in the Civil Aeronautics Act, and none was intended by the Congress.[16] This, standing alone, affords a complete answer to petitioner.

Moreover, we note that the language of the *Pacific Wholesalers* case relating to the agency between that association and its members is inapposite here. In *Pacific Wholesalers* there was no solicitation of sellers to use the services of the shippers association or any holding out to them of a public transportation service. Rather, when purchases were made, the seller was directed to deliver the goods to the association as the

[16] Part IV of the Interstate Commerce Act, the Freight Forwarder Act, was adopted in 1942, four years after the passage of the Civil Aeronautics Act. The House Report (Report No. 1172, 77th Cong., 1st Sess.) discloses that the Congress carefully drafted the Freight Forwarder Act in such fashion as to avoid any application to indirect air carriers of property. Moreover, Sections 1003 (b) and 412 (b) of the Civil Aeronautics Act were amended by the Freight Forwarder Act (see Section 4 of the Act of May 16, 1942, 56 Stat. 300, 301). Had Congress intended an exemption for "nonprofit" cooperative associations engaged in forwarding activities as in the case of similar surface forwarders, it would have provided the exemption in the course of its amendments to the Civil Aeronautics Act. Moreover, it may be noted that only those persons who perform the services defined as freight forwarding are included within the coverage of Part IV of the Interstate Commerce Act. The scope of the Civil Aeronautics Act is not so limited, but covers all those persons who perform what are essentially common carrier services in air transportation.

agent of the purchasing member, and the goods were forwarded by the association as the agent of the member. The Court held only that the arrangements between the association and its members which made it possible for the association to pass on savings to such members did not constitute a holding out to nonmembers (i. e., the consignor-sellers). The Court did not have before it and therefore did not pass upon a situation in which the association solicited business from all those persons dealing with the membership.

Here, petitioner actively solicits consignees, and the record shows that on numerous occasions (see *supra,* p. 15) consignees have requested the use of Bay Area. Moreover, as further distinguished from the *Pacific Wholesalers* case, petitioner's purpose is not restricted to the reduction of transportation costs to its members, but includes "saving the consignees their charges on air freight" (R. 140, see, also, R. 209). Accordingly, there is no warrant for petitioner's claim that it acts only as agent for its members in relation to the services on behalf of consignees. Petitioner is in the transportation business, and it is no more the agent of its members in this respect than any other carrier may be said to be the agent of those from whom shipments are received.[17]

There is nothing peculiar to cooperative organizations, including "nonprofit" organizations, which pre-

[17] Petitioner appears to suggest that its separate corporate entity should be disregarded both as to its services to members and consignees, and that the Court should view all of its activities as in reality between the individual members and the persons with whom they do business. But corporate entities are not to be disregarded in transportation matters unless some pub-

vents their being common carriers or public utilities, and the *Pacific Wholesalers* case certainly does not purport to alter existing law in this respect.[18] Petitioner argued before the Board, and suggests here, that, since it is not organized for "profit" and prorates the costs of its services, its operations are not "for compensation" within the meaning of Section 1 (21) of the Civil Aeronautics Act. But mere reimbursement for operating costs satisfies the "compensation" test, even where that reimbursement is alleged to be merely an "internal accounting arrangement." *Schenley Distillers Corp.* v. *United States,* 61 F. Supp. 981, 985, 987, 988 (Del., 1945), affd., 326 U. S. 432 (1946). See, also, *Citizens Bank* v. *Nantucket Steamboat Co.,* 5 Fed. Case No. 2730 (C. C., Mass., 1811); *Enterprise Trucking Corp., Contract Carrier Application,* 27 M. C. C. 264 (1941); *Re Merchants Truck Line of Pierpoint,* P. U. R. 1940 D.,

---

lic purpose is to be served, and there is no warrant for disregarding petitioner's separate organization and activities here. See e. g., *Schenley Distillers Corp.* v. *United States*, 326 U. S. 32, 437 (1946); *cf. North Whittier Heights Citrus Association* v. *National Labor Relations Board*, 109 F. 2d 76 (C. A. 9, 1940).

[18] See e. g., *West* v. *Tidewater Express Lines, Inc.*, 168 Md. 581, 179 A. 176 (1935); *State* v. *Rosenstein*, 217 Iowa 985, 252 N. W. 251 (1934); *North Shore Fish & Freight Co.* v. *North Shore B. Men's Assn.*, 195 Minn. 336, 263 N. W. 98 (1935); *Natural Gas Service Co.* v. *Serv-YU Cooperative*, 70 Ariz. 235, 219 P. 2d 324 (1950); *Affiliated Service Corp.* v. *Public Utilities Comm.*, 127 Ohio St. 47, 186 N. E. 703 (1933); *Nightingale* v. *San Miguel Power Assn.*, 50 P. U. R. (N. S) 318 (Colo. P. U. C., 1943); *Gilman* v. *Somerset Farmers Cooperative et al. Co.*, P. U. R. 1930 C. 98 (Me. P. U. C.), rev. on other grounds, 129 Me. 243, 151 A. 440 (1930); *Motor Freight Terminal Co.* v. *Burke*, P. U. R. 1932 C., 72 (Cal. R. R. C.); *Re Merchants Truck Line of Pierpoint*, P. U. R. 1930 D., 413 (S. D. B. of R. C.).

413 (S. D. B. of R. C.). Moreover, petitioner conveniently overlooks the sixty cents charged for each box of flowers handled. This certainly constitutes "carriage—for compensation" under any definition of the term. Cf., e. g., *Collins-Dietz-Morris Co.* v. *State Corporation Commission,* 154 Okl. 121, 7 P. 2d 123 (1932); *Smith* v. *New Way Lumber Co.,* 84 S. W. 2d 1104 (Tex. Civil App. 1935). Petitioner is more than reimbursed for its services here. In fact, it would show a definite profit if its income were not siphoned off by the trucker-agent. Under any view of the case, petitioner's services plainly are those of a common carrier.

II. The Board's cease and desist order is sufficiently definite in its terms

The Board in its report (Appendix B) carefully reviewed petitioner's activities, and concluded that it was a common carrier, and hence an indirect air carrier. In an order which specifically incorporated this report, the Board directed petitioner to cease and desist from engaging "indirectly in air transportation," i. e., engaging in common carriage (R. 389).

In complaining that the order is void for indefiniteness, petitioner's primary grievance appears to be that the Board did not spell out a precise and exact method by which petitioner could continue its activities and at the same time avoid the requirements of the Civil Aeronautics Act. We do not think any agency to be under such a duty, or that it must indicate what its views might be with respect to facts and circumstances different from those presented.

Further, it is legally impossible to draft an order which contains any hard and fast rule for determining common carriage, a determination which can be made only in the light of any given set of facts. The very respects in which petitioner alleges the Board's order to be deficient abundantly illustrate this point.

The manner of assessing and collecting advance and other charges or of contracting for drayage services (Br. pp. 27 and 28) are not determinative of common carrier status. See e. g., *Bowles* v. *Wieter,* 65 F. Supp. 359 (E. D. Ill., 1946). Nor is common carrier status controlled by an enterprise's corporate structure, its bylaws, or its classifications of membership (Br. p. 28), as illustrated by the various decisions cited in notes 9 and 18, *supra,* pp. 18 and 29. Certainly there exists no method by which an agency or a Court can determine the precise number of contracts which represents the dividing line between private and common carriage (Br. p. 27). And it is apparent that a person may be a common carrier both as to "straight" and "consolidated shipments" (Br. p. 27).[19] In fact, despite unceasing litigation, no Court to our knowledge has ever been able to define a common carrier other than in general terms such as a person in the transportation business who holds out

[19] The Railway Express Agency, which does not consolidate shipments, is an "indirect air carrier" under the Civil Aeronautics Act. *Railway Express Agency, Grandfather Certificate,* 2 C. A. B. 531 (1941); See *National Air Freight Forwarding Corp.* v. *Civil Aeronautics Board,* 197 F. 2d 384, 388, 389 (C. A. D. C., 1952). Moreover, it is common practice for forwarders to make "straight" shipments either as a special accommodation or because other shipments destined for the same or adjacent localities are not received so that consolidation is impossible.

his services to the public or who invites the patronage of the public. In this connection it is not amiss to point out that injunctions issued by the Courts against unlawful common carrier activities are seldom more specific than the Board's order, nor can they be.[20]

Petitioner's contentions regarding the indefiniteness of the Board's order are, we believe, wholly governed by the decision in *Brady Transfer & Storage Co.* v. *United States,* 80 F. Supp. 110 (S. D. Iowa, 1948), affd., *per curiam,* 335 U. S. 875 (1948). There the order also incorporated the Commission's report, and required the respondent to cease and desist from "the motor carrier operations which it is found in said report now to be conducting * * *." In response to a contention that the order was indefinite, the Court held (80 F. Supp. at p. 118)—

> * * * the Commission has gone to considerable lengths in advising Brady and other carriers of what factors may be relevant to a determination by the carrier of its rights under an irregular route certificate. It cannot, as

[20] In *American Shippers and Civil Aeronautics Board* v. *Twentieth Century Delivery Service*, S. D. Calif., Case No. 13217–BH, Judge Harrison recently issued an injunction against operations very similar to petitioner's which prohibited the defendant there involved from "holding out" to the public, or "undertaking" to provide for the public, assembly, consolidation, and break-bulk services in "interstate air commerce." Similarly, in *Alaska Air Transport* v. *Alaska Airplane Charter Co.*, 72 F. Supp. 609 (D. C. Alaska, 1947), the Court in effect enjoined the air carrier from operating as a common carrier, employing the familiar prohibition in its injunction against "holding out to the public" and "transporting" persons and property for compensation or reward. See, also, *Stickle Co.* v. *Interstate Commerce Commission*, 128 F. 2d 155, 156 (C. A. 10, 1942).

heretofore observed, lay down any hard and fast inelastic rule by which every case can be automatically determined. The order is sufficiently definite and certain that it is not invalid for want thereof.

The Board's report in this case fully discloses both the factual and legal basis for its determination, and affords adequate guidance to petitioner as to the elements of common carriage. Here, as in *Brady,* no greater specificity in the order was appropriate or required.

III. Even if reviewable, the Board's refusal to stay the effectiveness of the cease and desist order until completion of the *Air Freight Forwarder Investigation* case did not constitute an abuse of discretion

Petitioner requests, *inter alia,* that the Board's order be set aside on the ground that the Board should have permitted continuance of petitioner's operations pending completion of lengthy proceedings yet to be held in the *Air Freight Forwarder Investigation.* Although couching its argument in terms of an abuse of discretion on the part of the Board in refusing to suspend its order under the provisions of Section 1005 (d) (*infra,* p. 38), petitioner's plea in reality is that the Court act in a supervisory administrative capacity, and authorize or compel authorization or sanctioning of that which the Board has refused.

It is elementary, of course, that, in reviewing administrative orders, a "court of review exhausts its power when it lays bare a misconception of law and compels correction" *Scripps-Howard Radio* v. *Commission,* 316 U. S. 4, 10 (1942). If the Board's order

is valid on the merits, as we believe to be the case, a determination to this effect by the Court should end this review proceeding. Neither the issuance of operating authority nor the directing of such issuance is a judicial function. *Federal Radio Commission* v. *General Electric Co.,* 281 U. S. 464 (1930); *Federal Communications Commission* v. *Pottsville Broadcasting Co.,* 309 U. S. 134 (1940); *State Airlines* v. *Civil Aeronautics Board,* 174 F. 2d 510, 518 (C. A. D. C. 1949), reversed on other grounds, 338 U. S. 572 (1950); cf. *Scripps-Howard Radio* v. *Commission,* 316 U. S. at p. 14. Further, a sanctioning of unauthorized activities through the expedient of enjoining the enforcement of a valid administrative order is beyond the province of a Court. *Proctor & Gamble Co.* v. *Coe,* 96 F. 2d 518, 522 (C. A. D. C. 1938). Moreover, we note that Section 1005 (d) leaves to the Board, "as it shall deem proper," the question of whether it shall suspend its orders. We think the question of whether a valid Board order shall be suspended for reasons of regulatory policy to be one inappropriate for judicial determination, and committed to the exclusive discretion of the Board.

Nonetheless, if the question is open to review, it is plain that no abuse of discretion occurred. The Civil Aeronautics Act contemplates that authorization to engage in air transportation shall be obtained in advance of inaugurating operations, and not subsequent thereto. It is in the public interest that this principle be enforced; regulatory chaos otherwise would follow. As the Board found, if petitioner's unauthorized activities are to be sanctioned, then the same treatment would be required as to other persons.

The Board consistently has refused to sanction unauthorized forwarding activities (R. 393). This refusal is based not only on the general policy of law enforcement, but on practical reasons which are apparent from this record. Petitioner asserts that it handles over 50% of all the flowers moving from the San Francisco area. Without compliance with requirements reasonably designed to protect the public and the air transportation industry, petitioner has appropriated a substantial part of the air freight forwarding business. Organizations such as petitioner would multiply if not checked, with the results that the public would suffer from financially irresponsible organizations, effective regulation would be impossible, and the operations of these organizations would have a disastrous effect upon the regulated forwarders due to opportunities afforded for rate-cutting and the like (see R. 404, 405). Moreover, there is no reason now to believe that, at the conclusion of the *Air Freight Forwarder Investigation* case, persons such as petitioner will be permitted by exemption to operate free of regulatory control.

It is to be borne in mind that only a limited number of commodities move by air in substantial volume. The principal traffic (clothing, flowers, seafood, and other perishables and nonperishables having a relatively high value) is peculiarly susceptible to being handled by shippers' organizations. The effect upon the public and the air transportation industry of the operations of these organizations is important, whereas the burden of operating within the framework of the Act for those who can qualify is relatively slight. As the Board pointed out, petitioner can obtain au-

thorization and operate as a freight forwarder with little burden upon it, and at the same time provide the public with the protection to which it is entitled (R. 401, 402). Petitioner need not cease its activities unless it so elects. And if it does, there will be no dire consequences to the flower industry (see R. 402, 403). The fact that petitioner would prefer not to abide by the requirements of the Act during the period of time necessary for determination of the *Air Freight Forwarder Investigation* case, which we estimate to be at least a year, affords no basis for the claim of abuse of discretion advanced by petitioner.

CONCLUSION

The Board's order should be affirmed.

Respectfully submitted.

STANLEY N. BARNES,
Assistant Attorney General,
RALPH S. SPRITZER,
Special Assistant to the Attorney General,
Washington 25, D. C.
JOHN H. WANNER,
Associate General Counsel, Civil Aeronautics Board,
Washington 25, D. C.
EMORY T. NUNNELEY, Jr.,
General Counsel,
JAMES L. HIGHSAW, Jr.,
Chief, Litigation and Research Division,
O. D. OZMENT,
HENRY M. SWITKAY,
Attorneys, Civil Aeronautics Board,
Washington 25, D. C.

APPENDIX A

The pertinent provisions of the Civil Aeronautics Act of 1938, as amended,[1] are as follows:

Definitions

SEC. 1. As used in this Act, unless the context otherwise requires—

* * * * *

(2) "Air carrier" means any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation: *Provided,* That the [Board] may by order relieve air carriers who are not directly engaged in the operation of aircraft in air transportation from the provisions of this Act to the extent and for such periods as may be in the public interest.

* * * * *

(10) "Air transportation" means interstate, overseas, or foreign air transportation or the transportation of mail by aircraft.

* * * * *

(21) "Interstate air transportation," "overseas air transportation," and "foreign air transportation," respectively, mean the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce between, respectively—

(a) a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or between places in the

[1] Act of June 23, 1938, c. 601, 52 Stat. 973; Reorg. Plan No. IV, Sec. 7, effective June 30, 1940, 5 F. R. 2421, 54 Stat. 1235, 49 U. S. C. 401, et seq.

same State of the United States through the air space over any place outside thereof; or between places in the same Territory or possession of the United States, or the District of Columbia;

(b) a place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the United States, and a place in any other Territory or possession of the United States; and

(c) a place in the United States and any place outside thereof, whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

* * * * *

CERTIFICATE REQUIRED

SEC. 401 (a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the [Board] authorizing such air carrier to engage in such transportation * * *

ORDERS, NOTICES, AND SERVICE

* * * * *

SUSPENSION OR MODIFICATION OF ORDER

SEC. 1005 (d) Except as otherwise provided in this Act, the [Board] is empowered to suspend or modify its orders upon such notice and in such manner as it shall deem proper.

JUDICIAL REVIEW OF [BOARD'S] ORDERS

* * * * *

FINDINGS OF FACT BY [BOARD] CONCLUSIVE

SEC. 1006 (e) The findings of facts by the [Board], if supported by substantial evidence, shall be conclusive. No objection to an order of the [Board] shall be considered by the court unless such objection shall have been urged before the [Board] or, if it was not so urged, unless there were reasonable grounds for failure to do so.

APPENDIX B

UNITED STATES OF AMERCA

CIVIL AERONAUTICS BOARD

WASHINGTON, D. C.

E–7139

Docket No. 4902 et al.

CONSOLIDATED FLOWER SHIPMENTS, INC.—BAY AREA ET AL.

Decided February 5, 1953

CONSOLIDATED FLOWER SHIPMENTS, INC.—BAY AREA HELD TO BE AN AIR CARRIER ENGAGED INDIRECTLY IN THE TRANSPORTATION OF PROPERTY BY AIR AND ORDERED TO CEASE AND DESIST FROM VIOLATING SECTION 401 (a) OF THE ACT

Appearances: Antonio J. Gaudio for Consolidated Flower Shipments, Inc.—Bay Area, John C. Barulich and William Zappettini. Paul T. Wolf for Airborne Flower & Freight Traffic, Inc. John J. Stowell and William P. Sullivan for the Office of Enforcement, Civil Aeronautics Board.

Opinion

BY THE BOARD:

This proceeding was instituted by an order of the Board, adopted April 9, 1951 (Serial No. E–5264), to determine whether respondents Consolidated Flower Shipments, Inc.—Bay Area (Bay Area), John C. Barulich, and William Zappettini have been

or are now engaged indirectly in air transportation in violation of section 401 (a) of the Civil Aeronautics Act of 1938, as amended, and Part 296 of the Board's Economic Regulations.[1] On November 7, 1951, a formal complaint was filed by Airborne Flower and Freight Traffic, Inc. (Airborne), alleging in substance that Bay Area is or has been engaged unlawfully in indirect air transportation. This complaint was assigned Docket No. 5187, and subsequently was consolidated for hearing and decision in this proceeding.[2]

After due notice, a public hearing was held before Examiner Richard A. Walsh, who issued an Initial Decision recommending that Bay Area and Barulich be ordered to cease and desist from further violations of section 401 (a) of the Act and Part 296 of the Economic Regulations, and that the proceeding, insofar as it relates to Zappettini, other than in his capacity as an officer and director of Bay Area, should be dismissed. Respondents filed exceptions to the Initial Decision, supported by a brief. The Board has heard oral argument, and the case now stands submitted for decision.

Attached hereto as an appendix are portions of the Initial Decision, describing in detail the operations of Bay Area and Barulich and containing the findings, conclusions and recommendations with which we agree and which we adopt as our own.

The primary issue presented by the exceptions is whether Bay Area is a common carrier for compensation or hire. Bay Area is a nonprofit, nonstock

[1] Although only Bay Area was named as respondent in the order, Barulich and Zappettini were added as corespondents by stipulation at the prehearing conference held June 12, 1951, and it was agreed that they would be bound by the Board's decision herein and any orders issued pursuant thereto.

[2] Order Serial No. E–5993, adopted December 29, 1951.

company incorporated under the laws of the State of California.[3] It has a membership of 26 flower growers and shippers in the San Francisco Bay area and was organized for the purpose of pooling small individual flower shipments of the various members into large single shipments for transportation by air at lower bulk rates.

Respondents concede that in their physical aspects, the operations and service performed by Bay Area in behalf of its members are not unlike those usually performed by common carrier freight forwarders. It contends, however, that it is not a common carrier, because (1) it is a nonprofit corporation whose services are available only to its members, (2) its services are provided on a prorated cost basis, and, therefore, are not performed for compensation or hire, (3) it does not assume responsibility to its members for loss of or damage to shipments.

Upon the basis of the Examiner's findings and conclusions, we are satisfied that Bay Area is a common carrier for compensation within the meaning of the Act. The fact that membership in Bay Area is a prerequisite to obtaining its services does not detract from this conclusion, since membership is readily attainable, involves no obligation other than the payment of nominal dues, and has as its sole purpose

[3] At the oral argument, counsel for respondents advised the Board that a few days before the oral argument, amendments of incorporation were filed, bringing Bay Area under the Nonprofit Cooperative Association Act of the State of California. We are not required to determine the effect, if any, of such amendment upon Bay Area's status as a common carrier, because (1) the amendment referred to is not a matter of record in the proceeding, and (2) the determination whether a carrier is a common carrier depends not upon what its charter says, but upon the manner of its operations. *Terminal Taxi Co.* v. *Dist. of Columbia*, 241 U. S. 252, 254.

eligibility for Bay Area's services.[4] Nor does the fact that Bay Area's services are provided on a prorated cost basis mean that they are not performed for compensation, as the Examiner's discussion amply demonstrates.[5]

Respondent's contention that Bay Area is not a common carrier because, by agreement with its members, it does not assume responsibility for loss of or damage to shipments is fallacious. Liability for loss or damage is a consequence, rather than a test, of common carrier status. And a carrier cannot divest itself of its common carrier status by the simple expedient of entering into an agreement with its customers purporting to relieve itself of its normal liability. *Bank of Kentucky* v. *Adams Ex. Co.,* 93 U. S. 174, 180–181; *Railroad Company* v. *Lockwood,* 17 Wall. (84 U. S.) 357, 376.[6]

We conclude, therefore, that Bay Area is a common carrier for compensation and, as such subject to regulation under the Act. As to the other respondents, we agree with the Examiner that the proceeding

---

[4] The holding out of its services to shippers constitutes sufficient grounds for the conclusion that Bay Area is a common carrier. In addition, however, upon the basis of the Examiner's findings of fact with respect to the manner and extent to which Bay Area held out its services to consignees, we conclude that Bay Area is a common carrier by reason of such activities. See page 11 of the appendix [*infra*, p. 64].

[5] See p. 12 of Appendix [*infra*, p. 68].

[6] It is not clear whether, by this contention, Bay Area seeks also to avoid being classified as an air freight forwarder, which the Board has defined as one who, among other things, "assumes responsibility for the transportation of such property from the point of receipt to point of destination" (Sec. 296.1, Economic Regulations). If this be the thrust of respondents' argument, it would work to Bay Area's disadvantage, rather than to its benefit. Under the Act, no air carrier may operate in interstate air transportation without a certificate of public convenience and

should be dismissed as to Zappettini, other than in his capacity as an officer and director of Bay Area. With regard to Barulich, we do not find it necessary to determine whether he is a joint adventurer with Bay Area in the operation of the latter's service, since any order against Bay Area would also run against Barulich as its executive secretary, as well as against its officers, directors, representatives, and agents generally. Having concluded that Bay Area is a common carrier for compensation under the Act, has operated as an indirect air carrier in violation of section 401 (a) of the Act, and that it should be ordered to cease and desist from so doing, it is unnecessary for us to determine whether Bay Area is a freight forwarder under Part 296 of the Economic Regulations.

We have carefully considered all of the exceptions to the Initial Decision and find, except to the extent indicated herein, the exceptions are without merit and should be overruled. In view of the foregoing and all the evidence of record, we find:

1. Bay Area, a corporation organized, existing and doing business under the laws of the State of California, has held itself out and continues to hold itself out to the public as a common carrier to provide transportation of property in interstate commerce for compensation and is an air carrier as defined in section 1 (2) of the Act engaged indirectly in the transportation of property by air within the meaning of the Act.

2. Bay Area has not held and does not now hold a certificate of public convenience and necessity, a letter of registration, or any other authority from the Board

---

necessity, unless the Board exempts it from such requirement (Secs. 1 (2), 401 and 416). Air freight forwarders currently operate pursuant to a general exemption granted in Sec. 296.3 of the Economic Regulations. It would follow, therefore, that if Bay Area does not meet the definition of an air freight forwarder in Sec. 296.1, it cannot qualify for the exemption.

authorizing it to engage indirectly in air transportation of property as a common carrier for compensation.

3. Bay Area has been and continues to be in violation of section 401 (a) of the Act.

4. Bay Area and Barulich, its executive secretary, and its officers, directors, agents, and representatives should be ordered to cease and desist from engaging indirectly in air transportation in violation of section 401 (a) of the Act.

5. This proceeding, insofar as it relates to Zappettini, other than in his capacity as officer and director of Bay Area, should be dismissed.

An appropriate order will be entered.

Ryan, Chairman, Lee, Adams, and Gurney, Members of the Board, concurred in the above opinion.

APPENDIX

EXCERPTS FROM THE INITIAL DECISION OF EXAMINER RICHARD A. WALSH, IN THE CONSOLIDATED FLOWER SHIPMENTS, INC.—BAY AREA—DOCKET NO. 4902 ET AL.

Bay Area was originally organized in April 1949, as an unincorporated nonprofit association under the name of Bay Area Flower Shippers and Growers. The association was composed of a small number of flower growers and shippers in the San Francisco bay area, and was formed for the purpose of pooling small individual flower shipments of the various members into large single shipments for transportation by air to other competitive areas at lower bulk rates. On June 14, 1949, the association was incorporated under the name of Bay Area Flower Shippers and Growers, Inc., as a nonprofit nonstock company and by amendment of its articles of incorporation on January 25, 1950, it acquired its present name of Consolidated Flower Shipments, Inc.—Bay Area.

According to its articles of association Bay Area was incorporated for the purpose of considering and formulating plans for the most economical transportation of flowers to eastern markets. The articles provide that Bay Area may employ such agent or agents as are necessary in the furtherance of this objective and it is empowered to do any and all things necessary in promoting the interest of the corporation which, by virtue of an amendment of the articles of association, effective February 18, 1952, includes the right to purchase, lease, hold, sell, develop, mortgage, convey, or otherwise acquire or dispose of real or personal property.

The articles provide for the offices of President, Vice President, Secretary and Treasurer and a board of directors consisting of three members. Under the bylaws the corporate powers are vested in the directors who are elected annually by the members. The president and other officers of Bay Area are appointed by the directors, who are also empowered to conduct, manage, and control the affairs and business of Bay Area and to formulate rules for the guidance of the officers in the management of its affairs. Under the bylaws as originally constituted the principal duties of the president consisted of presiding over all meetings of the corporation, the signing of contracts and other instruments having the prior approval of the directors, and the disbursement of funds by drawing upon the corporation's account when authorized by the Board. Initially the treasurer was authorized to receive funds and to make deposits in banks designated by the directors, and to disburse funds only upon checks signed by him and the president.

However, the bylaws were amended February 9, 1951, authorizing the president and directors to delegate the authority to sign contracts and draw checks to

other officers of the corporation, and authorizing the treasurer to direct the executive secretary to handle the corporate funds and make disbursements on checks signed by the president or an appointed director and countersigned by the secretary or executive secretary.

John C. Barulich is the sole owner and operator of Airport Drayage Company which performs pickup trucking service for the Bay Area members in the San Francisco area. As executive secretary of Bay Area Barulich performs or supervises the performance of consolidation services for Bay Area the details of which will be discussed later herein.

Barulich has been employed in various phases of transportation for the past 18 years. His experience includes service in shipping departments and warehouses of several reputable department stores and mercantile establishments and in the rates and tariff department and traffic department of two western railroads. Prior to joining Bay Area as traffic manager in September 1949 he was general traffic manager and superintendent of warehouses for the City of Paris Department Store in San Francisco and was chairman of the Central Committee for Air Movement of the Western Traffic Conference of which the City of Paris was a member. During the several months following his resignation from the City of Paris, Barulich became northern California Manager for California Shippers Associates and at the same time represented the Los Angeles Wholesale Institute in joint loading ventures. In addition Barulich took several courses in Traffic Management at Golden Gate College and Stanford University.

William Zappettini, former president and now vice president and director of Bay Area, is one of the largest wholesale flower shippers and growers in the United States. He has been in the flower business

since 1921 and has establishments located in San Francisco and Los Angeles, California and in Dallas and Fort Worth, Texas. This Respondent first began shipping flowers to eastern cities in rail refrigeration cars in 1927 and was one of the first persons in the area to ship flowers by air; the first such shipment occurring in 1937 or 1938. Zappettini continued to ship by air until the beginning of World War II when he was forced to discontinue due to the exigencies of the defense effort. Zappettini resumed shipping by air after the war on a direct carriage basis which involved his turning the flowers over directly to the air carriers for transportation. After the economies of bulk shipping were pointed out to him by representatives of airlines Zappettini joined with others in organizing Bay Area and has been an officer and director of that organization from its inception.

* * * * *

Prior to the organization of Bay Area the flower shippers in the San Francisco area had available for the transportation of their products the services of the direct air carriers who were operating under the so-called collect distribution system,[7] and the consolidation services of Airborne. Motivated by a desire to obtain lower air freight rates to eastern points through bulk shipping Al Decia, owner of California Floral Company, and Clyde E. Reynolds, owner of Reynolds Brothers Transfer and Storage Company, canvassed a number of flower growers and shippers in the San Francisco area in early April 1949 and solicited their membership in the Bay Area associa-

[7] The collect distribution service involved an undertaking by the direct air carriers to transport the shipment of a single consignor to destination and there to break-bulk with respect to such shipment and to distribute the component shipments to the various consignees.

tion. After several meetings of the prospective members the association was incorporated on June 14, 1949, under the name of Bay Area Flower Shippers and Growers, Inc. Prior thereto, on June 7, 1949, Bay Area entered into an agreement with Clyde Reynolds to provide pickup, assembly and consolidation services for its members. Under this agreement, Reynolds received 50 cents for each box of flowers picked up at the shippers' places of business and delivered to his office at the airport and 25 cents for each box which the shippers delivered to the airport themselves.

By letter dated June 15, 1949, Zappettini appointed Reynolds agent for Bay Area for the purpose of issuing and countersigning Bay Area airbills. Under his agreement with Bay Area, Reynolds was not precluded from hauling shipments for nonmembers but although such shipments were transported to the airport in the same truck with those of the members none were consolidated with those of Bay Area or shipped on Bay Area manifests. The minimum pickup charge for nonmembers shipments was 75 cents per box. Reynolds selection of the underlying air carrier for movement of the flowers from origin to destination was subject to general routing instructions issued from time to time by Bay Area.

At the instance of the Bay Area officers and directors Reynolds leased office space at the San Francisco Airport where the assembly and consolidation services with respect to Bay Area shipments were performed. Reynolds executed the lease in his own name and it was he and not Bay Area who paid the office rent during his entire period of service with Respondent. Except for certain small articles of equipment owned by the Airport Authority Reynolds owned all of the office equipment at the airport office. Reynolds utilized

the services of from 1 to 4 drivers in his trucking service for Bay Area and of one employee at the airport for the performance of paper work incident to the assembly and consolidation of shipments.

Airbills for consolidated shipments were prepared by Reynolds or his employee at the airport office and the advance charges for his services were shown on the face thereof as being due and owing and payable to Reynolds Brothers. Upon delivery of the shipments at destination the advance charges were collected from the consignees by the direct air carriers and remitted to Reynolds who deposited them in his own account for his own use. Reynolds received no compensation from Bay Area for his services as agent but as indicated he did receive the whole of the advance charges assessed against each shipment for his trucking and consolidation services. The evidence shows that during the period July 27, 1949, to June 24, 1950, Reynolds paid all of the expenses of the Bay Area operation, including, the salary of his airport employee Talmadge Lloyd and rental for the airport office. The officers of Bay Area with the assistance of Reynolds arranged for the services of break-bulk agents for distribution of the smaller component shipments to the various consignees.

The first Bay Area shipments were made on or about June 24, 1949, and during the initial phase of the operation they moved on airbills of the direct air carriers which were prepared by Reynolds from the manifests prepared by the member shippers and received with the boxes at the airport. A separate airbill was prepared for each break-bulk point showing among other things the name Bay Area, Reynolds, agent, as consignor, the break-bulk agent as consignee, the number and total weight of the boxes being shipped, the description of the commodity, whether

cut flowers or decorative greens, and the total transportation charge, including the advance charges due Reynolds Brothers. Some of the boxes in the consolidation were transshipped to cities beyond the break-bulk points in which case a new airbill was prepared by the break-bulk agent naming himself as consignor and the purchaser of the flowers as consignee.

Although routing instructions were issued periodically by Bay Area indicating the airlines to be used in transporting flowers to certain cities, in practical effect Reynolds exercised a rather broad discretion in his choice of air carriers. For example, Bay Area issued instructions to Reynolds on July 12, 1949, to use American Airlines to Dallas, St. Louis, Memphis, Nashville, the District of Columbia, Philadelphia and New York, and Flying Tigers to Kansas City, Chicago, Detroit, Cleveland, and New York. However, on July 26, 1949, flowers were shipped via United Air Lines to Chicago, Cleveland, and the District of Columbia, and on August 3, 1949, in accordance with instructions on American's airbill, a shipment was dispatched beyond the District of Columbia, the break-bulk station, to Norfolk via Capital Airlines on the latter's airbill. Although all shipments now handled by Bay Area are transported without benefit of cargo insurance, a policy was issued in the name of Bay Area on August 25, 1949, insuring subscribing members against loss or damage to shipments until August 1, 1950. In each case the insurance charge was inscribed on the face of the airbill and collected along with the other charges from the consignee.

Pursuant to meetings of the board of directors held in August 1949, Bay Area began using its own manifests, it instructed Reynolds to give all airlines part of the consolidations, and it considered placing

stickers on boxes or airbills and changing Bay Area's name as a means of advertising its service. It also imposed an assessment of $25 on each member for the purpose of meeting operating expenses. At a meeting of the directors held September 23, 1949, Bay Area employed Barulich for a trial period of two weeks to handle consolidations and for the purpose of contacting disinterested members who were about to discontinue Bay Area's service and of soliciting new members in order to increase its volume of business and effect greater savings on shipments. As compensation for his services Barulich received a fee of 10 cents for each box of flowers transported by Reynolds to the airport and 5 cents per box for those delivered to the airport by the shipper. Barulich's compensation was paid by Reynolds out of the proceeds from advance charges, payments being made at regular intervals from October 7, 1949, until June 16, 1950.

Barulich was appointed agent for Bay Area by Zappettini on November 1, 1949, for purposes of issuing and countersigning airbills. On November 14, 1949, Barulich entered into an agreement with 8 Bay Area members for his services as traffic manager at the rates of compensation indicated above. His duties under this agreement were to have consisted of arranging for and supervising the pickup, assembly and consolidation services, and the handling of cargo insurance, claims and related matters. However, according to the testimony of Messrs. Reynolds and Lloyd, Barulich concerned himself for the most part with public relations work with member shippers and with soliciting new members at least until June 1950, and, notwithstanding his appointment as agent and traffic manager for the Bay Area members, the ad-

vance charges continued to be made in the name of Reynolds until June 10, 1950.

At a meeting of the directors held April 14, 1950, Barulich was appointed executive secretary of Bay Area and as such was authorized to sign contracts, and, in the absence of the president and vice president, to receive and deposit Bay Area funds in banks designated by the directors, and over his countersignature to disburse funds on checks signed by the President or an appointed director. The directors also approved the location of Bay Area's general office at Barulich's rail terminal office located at 815 Brannan Street in San Francisco and instructed Barulich to negotiate with Reynolds regarding the latter's proposed increase in hauling charges, and if unsuccessful to secure the services of another trucker at the then prevailing rate. In addition the directors passed a resolution prohibiting individual members from signing contracts and providing that, in the future, Bay Area alone should act and sign contracts in behalf of the members. At the same time the Board approved Barulich's association with the Flower Consolidations of Southern California and his assistance to that company in organizing a consolidation service in Los Angeles similar to that of Bay Area.

* * * * *

Subsequent to the April 14, 1950, meeting of the Bay Area directors, Reynolds submitted a proposed optional service contract to Bay Area, one part of which proposed a trucking service only at a rate of 35 cents per box and the other a complete service including trucking, assembly and consolidation at the prevailing rates of 50 cents per box and 25 cents per box, respectively. Under the second alternative Barulich's services would not be required. When Bay Area

failed to accept his offer Reynolds terminated his service with Respondent on June 13, 1950, and during the next 10-day period Bay Area shipments were joint loaded with those of Airborne, and such shipments as Airborne obtained itself from Bay Area members were handled as Airborne shipments.

Pursuant to negotiations with Barulich, Reynolds operated a trucking service only for Bay Area during July and early August 1950 at a charge of 30 cents per box. Reynolds received payment for his service from Barulich who performed the consolidation service during that period. Barulich received for his service the difference of 20 cents per box between Reynolds charge and the advance charge of 50 per box. Reynolds discontinued his service completely for Bay Area when he sold his flower truck to Airborne on August 24, 1950. During the next few days the large shippers, including Messrs. Zappettini, Benaccorsi, Enoch and Nuckton, transported their own flowers to the airport. In response to the demands of and with the financial assistance of the latter individuals, Barulich purchased his own truck on or about August 26, 1950, and began operating a complete trucking, assembly and consolidation service. Trucking charges assessed against members who had hauled their own flowers to the consolidation point during the interim period were refunded by Barulich.

The procedure followed by Barulich in his performance of service for Bay Area is substantially similar to that employed by Reynolds. Each day Barulich calls the shippers to ascertain the number of boxes being shipped to each destination and after computing the totals of such shipments he calls the airlines for space reservations on their late afternoon or evening flights. Beginning at 1 p. m. and continuing until about 6 p. m. each day trucks are dispatched to the

shippers' places of business in the San Francisco area where the flowers are picked up and transported to Bay Area's airport office. Each shipment when received is accompanied by a flower manifest prepared in advance by the shipper on the face of which there appears his name as consignor, the name and address of the consignee, the number of boxes, the actual and dimensional weight of the boxes, whether it is being shipped collect or prepaid and whether it is to be shipped direct or as part of a consolidated shipment. In some cases the shippers prepare the airbills for direct shipments.

Upon receipt of the boxes at the Bay Area office the airbills and manifests are segregated according to whether they are direct or consolidated shipments, and further according to destination. Separate airbills are then prepared for the consolidated shipments for each break-bulk station. These airbills are prepared from the information appearing on the manifests and on the face thereof show Bay Area, Barulich agent, as consignor, the name of the individual or break-bulk agent, the number of boxes, description of the commodity, the weight of the shipment and charges therefor, whether it is a direct or consolidated shipment, whether it is prepaid or collect, and the beyond routing if any. The Bay Area advance charges are then inscribed on the airbills and manifests after which they are delivered with the boxes to the direct air carriers.

The air carrier enters the shipping charges on the airbill, retains one copy of the airbill, sends one copy with the manifests attached along with the shipment to the break-bulk agent for distribution purposes and returns one copy of the airbill and two copies of the manifests to Bay Area. The latter prorates the shipping charges on the manifest and retains the copy of

the airbill and one copy of the manifest and sends the other copy of the manifest to the shipper. Airbills are picked up by Bay Area daily from the direct air carriers and taken to its office where daily summaries are made of the advance charges. The air carriers are billed periodically for these charges which they pay directly to Barulich who deposits the proceeds thereof in his personal account.

Upon delivery of the shipment at destination the air carrier hands the airbill and manifest to the break-bulk agent who prepares therefrom a delivery statement setting forth the names, addresses and charges with respect to each consignee. The agent then breaks bulk and delivers the individual shipments to the various consignees and collects from them the total charges including his delivery charge. The break-bulk agent prepares new airbills for shipments moving to points beyond the break-bulk point, naming himself as the consignor and the purchaser as the consignee and the flowers are transshipped in accordance with the instructions on the manifests. The direct air carrier collects the shipping charges including Bay Area advance charges from the consignee and the advance charges are remitted to Barulich by the air carrier as indicated above.

Early in 1951 certain new services were made available to Bay Area members such as weather reporting, information relating to routings, general shipping and eastern market conditions, and procedures for the collection of c. o. d. deliveries and claims for lost or damaged shipments. C. o. d collections are remitted by the air carriers directly to the shippers but claims for lost or damaged shipments are filed by Bay Area with the direct air carriers and the proceeds thereof are remitted to Bay Area which in turn remits to the

shipper less a 10-percent commission paid to Barulich for his services in handling the claims.

The Chief of the Board's Office of Enforcement addressed a letter to President Zappettini on January 16, 1951, advising him of the possibility that Bay Area might be operating an air freight forwarder service and requesting him to submit a detailed statement describing the operation together with copies of the shipping documents used in the service. There was enclosed with his letter a copy of Part 296 of the Economic Regulations outlining the procedure to be followed by applicants in applying for Letters of Registration as air freight forwarders. Thereafter on February 9, 1951, Barulich negotiated a formal contract of employment with Bay Area pursuant to which he became executive secretary of Bay Area and was guaranteed a minimum annual compensation of $5,000 for his services. The record shows that the latter provision of the contract would become operative only in the event his annual income from advance charges fell below the $5,000 figure and even then he would receive only the difference between the amount actually earned and that guaranteed. The names of the 26 Bay Area members in good standing as of the same date appear in the footnote below.[8] On July 31, 1951, the Bay Area directors increased the advance

[8] Mountain View Greenhouses, Ozawa Bros. Nursery, T. & D. Wholesale Florist, F. H. Tsuneda, Tom Ozawa, Bear State Nursery, J. L. Mockkin, California Floral Company (Virginia Decia), Peninsula Wholesale Florist, S. F. Wholesale Cut Flowers, R. J. Adachi, Wong Wholesale Florist, John Nuckton Company, Bay Read Nursery, J. Oishi Nursery, A. G. Enoch Company, Boodell & Company, Western Wholesale Florist, Davidson & Matraia, William Zappettini Company, Golden Gate Wholesale Florist (James Bonaccorsi), Amling Floral Supply, Kearns Floral Supply, Stonehurst Nurseries, Shibuya Co., and Takamum Nursery.

charges by 10 cents per box of which 5 cents is retained by Barulich and 5 cents paid to the Bay Area operating fund. The purpose of the increase was to help Barulich meet the increase in operating expenses of his trucking service and to bolster Bay Area's cash resources so that it might contribute its pro rata share of the operating expenses of the Bay Area office. A part of the proceeds was also used to defray the expenses of Barulich's trip to Washington to attend the prehearing conference in this proceeding, and for legal fees.

The Bay Area members were notified by Barulich on July 16, 1951, of action taken at the second annual meeting of the membership levying an assessment of $50 for annual dues on each member payable on or before July 31, 1951. According to the testimony of Barulich this assessment was made necessary because of the tremendous increase in legal expense resulting from the instant proceeding.

At a meeting of the Bay Area members held in early August 1951 Messrs. Nuckton, Zappettini, Enoch, Bonaccorsi and Tsukagawa were elected directors and they in turn appointed Messrs. Nuckton, president, Zappettini, vice president and Tsukagawa, secretary-treasurer. During the period June 25, 1951, to October 13, 1951, six new firms were admitted to membership in Bay Area but on October 24, 1951, an equal number of members were dropped for nonpayment of annual dues.[9] This represents the first action ever taken by Bay Area to expel any shipper for any reason including nonpayment of dues * * *.

In this connection the record shows that a number of Bay Area members including Western Wholesale

[9] California Floral Co., Wong Wholesale Florist, J. Oishi Nursery, Davidson & Matraia, Stonehurst Nurseries, and Shibuya Company.

Florist, The Zappettini Company, Nuckton Company, Golden Gate Wholesale and the A. G. Enoch Company do not utilize Bay Area's service exclusively. Many of these members make frequent use of Airborne's service for both straight and consolidated shipments, and this is especially true where the consignees request excess valuation for their shipments and where shipments are destined to cities not served by Bay Area. Some members also ship via Airborne to cities served by Bay Area, and at least two shippers, Ambling Floral Supply and Boodell & Company, who ship regularly via Airborne are still members in good standing in Bay Area although they make only occasional or intermittent use of the latter's service.

As of October 24, 1951, Bay Area still had 26 members in good standing and it served 750 wholesale flower consignees scattered throughout the 48 states of the United States, the District of Columbia, and Canada. The record indicates that only 7 of the Bay Area members ship entirely on a consignment basis although approximately 68 percent of the 40,447 boxes handled by Bay Area in the last six months of 1951 involved consignment sales.

* * * * *

While admitting that the physical aspects of its operation are similar to those of an air freight forwarder Bay Area takes the position that it is not a common carrier or an air freight forwarder and that, therefore, its operation is not subject to the jurisdiction of the Board under the Act. Specifically, it denies holding out to the public that it undertakes to transport property for compensation or hire, or that it provides transportation by air of articles for any person tendered in compliance with published tariffs.

Although the term common carrier is not defined in the Civil Aeronautics Act, it has a well established

meaning in law and has been defined variously in decisions of the Board and of the courts as one who holds himself out as ready and willing to undertake for hire the transportation of passengers or property from place to place and so invites the patronage of the public.[10] A private carrier, on the other hand, is generally defined by the courts as one who, without being engaged in such business as a public employment, undertakes for hire to deliver passengers or property in a particular case or under a special contract or special circumstances and does not hold itself out to the public as ready to act for all who may desire its services.[11]

The essential elements of common carriage are the holding out by the carrier of its service to the public and the undertaking to transport for hire passengers or property from origin to destination. The basic distinction therefore, between a common carrier and a private carrier for hire is that the common carrier holds itself out to all members of the public who might desire to use its service while the private carrier for hire agrees to carry such traffic only in special cases.

(a) Holding out of Service to Public

While there are many definitions of the term "holding out" the clearest and most understandable one is found in a decision of the Interstate Commerce Com-

[10] *Universal Air, Investigation Forwarding Activities*, 3 C. A. B. 698 (1942); *Page Airways, Inc., Investigation*, 6 C. A. B. 1061 (1946); *Transocean A. L., Enforcement Proceeding*, 11 C. A. B. 350 (1950); *Stimson Lumber Co.* v. *Kuykendall*, 275 U. S. 207 (1927); *Blumenthal* v. *United States*, 88 F. (2d) 522 (1937).

[11] *Smitherman and McDonald* v. *Mansfield Lumber Co.*, 6 F. (2d) 29; *Sanger* v. *Lukins*, 24 F. (2d) 226; *McKay* v. *Public Utilities Commission*, 104 Colo. 402, and cases cited in footnote 10.

mission rendered in 1939,[12] wherein the commission said:

> The question arises as to the meaning of "holds itself out" as applied to a common carrier. They clearly imply, we believe, that the carrier in some way makes known to its prospective patrons the fact that its services are available * * *. However the result may be accomplished, the essential thing is that there should be a public offering of the service, or in other words, a communication of the fact that the service is available to those who may wish to use it.

Accordingly, the real test for determining whether there has been a holding out to the public is whether a public offering of service has actually been made regardless of the time or the means employed by the carrier in bringing it to the attention of the public. It has long been recognized that a "holding out" may be accomplished in a great variety of ways. The most common method of course is by advertising the service in newspapers, magazines, brochures, etc. However, the mere absence of advertising raises no presumption that the carrier has not held its service out to the public if, in fact, the holding out had been accomplished by other means.

Reference to some of the leading court and administrative laws cases on the subject disclose many examples of what constitutes a holding out to the public. Thus, a holding out may be accomplished through solicitation by salesmen or agents, or it may be attained without the aid of solicitation or advertising if the evidence indicates that the carrier as a matter of policy generally serves all patrons, within the limits of its facilities, who may require its service, or that it maintains a known place of business where

[12] *Northeastern Lines, Inc.*, 11 M. C. C. 179 (1939).

members of the public may apply for its service.[13] It is clear also from these cases that a carrier need not serve all of the public in order to be classed as a common carrier, but may limit its service to a class or segment of the public provided it is willing to serve indiscriminately all members of the class.[14]

Moreover, the mere existence of written contracts governing the rendition of service irrespective of their legal sufficiency is not determinative of a carrier's status if in fact the service is available to the public. The important consideration in such cases is not the avowed purposes of the contract or the carrier's corporate charter but the manner in which the carrier actually provides the service. Thus, a carrier might perform services under contract with its patrons or even advertise itself as a contract carrier but such contracts and self-serving declarations would have no weight in determining the carrier's status where it appears from the manner in which the service is performed that it is available to the public generally. An occasional refusal by the carrier to provide service is likewise not sufficient to avoid the character of common carriage.[15] If on the other hand, the carrier

[13] *Grolbert* v. *Board of Railroad Comrs. of State of Iowa*, 60 F. (2d) 321; *Breuer* v. *Public Utilities Commission*, 118 Ohio St. 95, 160 N. E. 623 (1928); *Stoner* v. *Underseth*, 85 Mont. 11, 277 P. 437 (1929); *Marshall* v. *Public Service Commission*, 129 Pa. S. 272, 195A. 475 (1937); *In re Riss and Co., Inc.* (Colo. P. U. C.), 9 PUR (NS) 331 (1934); *Hopke Freight Forwarder Application*, 265 I. C. C. 726 (1950) (affirmed in mimeograph opinion dated October 1, 1951); *Terminal Taxicab Co.* v. *Dist. of Col.*, 241 U. S. 252 (1916).

[14] *Producers Transp. Co.* v. *R. R. Comm.*, 251 U. S. 228 (1920); *Fordham Bus Corporation* v. *United States*, 41 F. Supp. 712; *Smitherman & McDonald* v. *Mansfield Hardwood Lumber Company*, *supra*.

[15] *Grolbert* v. *Board of Railroad Comrs. of State of Iowa*, *supra*.

operates a continuing service of a highly specialized nature and it invariably refuses service to almost everyone who applies for it, and the service is definitely limited to an individual or a particular few individuals who contract with the carrier for it, the carrier may be a private carrier for hire.[16]

It is apparent from these cases that before a carrier may enjoy the status of a private carrier it must meet the above-mentioned primary tests of private carriage. It is equally apparent that the more contracts and the more patrons a carrier has, the greater is the likelihood that it may be a common carrier. As may be seen from the discussion that follows and cases cited, the law of common carriage applies with equal force to transportation associations as it does to any other class or group of shippers.

An analysis of Bay Area's operations leaves little room for doubt that this Respondent's service is being held out to the public. First of all it is noted that neither its articles of association nor its bylaws contain any limitation on membership in Bay Area. The articles and bylaws do not restrict membership to flower shippers or limit its services to members and they contain no requirement for the payment of dues or contributions to Bay Area's operating expenses. Being unrestricted in these respects Bay Area could expand its operation to include not only all of the flower shippers and other members of the shipping public in the San Francisco area but to shippers in other West Coast cities as well. If this were to happen it could seriously affect the operations of the regulated air freight forwarders and impair the Board's regulatory power over a substantial portion of the air freight forwarder industry. Both prior to

[16] *Ace High Dresses* v. *J. C. Trucking Co.*, 122 Conn. 578, 191A. 536 (1937).

and subsequent to incorporation new members were solicited for Bay Area from among the flower shippers in the San Francisco area by Mr. Reynolds and Mr. and Mrs. Decia, and later by Barulich for the express purpose of increasing the volume of Bay Area shipments in order to obtain lower air freight rates. A number of nonmember shippers testified that they had been solicited for membership and several Bay Area officers, including Barulich, testified that any flower shipper in that area was eligible for membership and that no application for membership has ever been refused. At a meeting of the Bay Area members held August 12, 1949, the directors were instructed to accept any shipper in the Bay Area consolidation for the purpose of obtaining lower air freight rates. As of the time of hearing Bay Area had 26 members in good standing out of a maximum of 225 flower shippers in that area and no member had been expelled until October 24, 1951, when four were separated for nonpayment of annual dues.

In addition to providing service for its member shippers Bay Area also ships flowers to some 750 wholesale florists located in various cities in the United States and Canada. The evidence reflects a concerted effort on the part of this Respondent to expand its service to other shippers and receivers through advertising and by urging its consignees to insist on having their flowers routed via Bay Area. In corresponding with consignees Barulich would invariably close his letters with the following or similar admonition, "For the best of service and the lowest charges insist that your flowers are routed via 'Bay Area' (no extra charge or hidden fees)". A number of member and nonmember shippers testified to having received requests from their consignees to ship their flowers through Bay Area. In addition

Bay Area's name was changed for advertising purposes and it paid the expenses of having its name painted in large letters and prominently displayed on Barulich's trucks which made daily pickups of shipments throughout the San Francisco area. Other media of advertising and a solicitation consisted of placing Bay Area advertising labels on member shipments and active solicitation of new members and receivers by both Respondent's officers and members.

An exhibit was submitted by Bay Area disclosing that during the last six months of 1951 approximately 68 percent of its shipments involved consignment sales. The purpose of this exhibit was to disprove the holding out of service by Bay Area to the consignees by showing that the member shippers rather than the consignees bear the burden of the transportation charges with respect to the vast majority of the shipments for which reason Respondents conclude the consignees could not be held to be purchasers of Bay Area's service. The logic of this distinction is not readily apparent for it may be assumed that regardless of how a commodity is shipped whether on consignment, direct, or prepaid, the transportation charges are ultimately reflected in the purchase price paid by the consumer and for this reason it would appear immaterial who pays the freight charges. However, the evidence in this case establishes that the bulk of Bay Area's shipments are sent "collect" irrespective of whether they involve consignment or direct sales. When the shipments are received at destination the consignees pay the break-bulk agent, and he pays the airline which in turn remits the advance charges to Bay Area. It is apparent from these facts that the consignees pay the transportation charges in the first instance, including the Bay Area advance charges, and such being the case Respondents'

contention to the contrary is without merit and is therefore rejected. Accordingly, since the weight of authority holds that such consignees are purchasers of the transportation service,[17] it is concluded that these 750 consignees are members of the air shipping public to which Bay Area has held out its service.

Considering next the question of what constitutes the public insofar as Bay Area is concerned it has been found from a review of the various authorities on the subject that the term itself has a well-defined meaning.[18] The term "public" insofar as it relates to carriage does not necessarily mean the entire nation or even an entire industry but by comparison may be either a large or small or a broad or narrow segment of the general public depending upon the activity engaged in by the carrier and the portion of the market encompassed by that activity which he serves. Thus, on the basis of the decisions in the above-cited cases Bay Area's public comprises that part of the air shipping public who ship and receive flowers and decorative greens by air. As indicated previously Bay Area now serves a substantial number of flower shippers and receivers and potentially its service could include all of the shippers in the San Francisco and adjoining areas and a substantial number of the eastern consignees. Even if it were found that Bay Area's service is actually available to only one of two above-mentioned groups, either group represents a substantial part of the air shipping public and in either case Respondent's service would be available to the public. The logic of this conclusion is more readily apparent when it is considered that

---

[17] *Doughty-McDonald Grocery Co.* v. *A. T. & S. F. Ry. Co.*, 155 I. C. C. 47 (1929); *Adams* v. *Mills*, 286 U. S. 397 (1932).

[18] *Terminal Taxicab Co.* v. *Dist. of Col.*, *supra; Anderson* v. *Fidelity & Casualty Co.*, 228 N. Y. 475, 127 N. E. 584 (1930).

in 1951 Bay Area shipped 60,000 boxes of flowers and greens weighing approximately 40 pounds each to eastern consignees. It can hardly be disputed that such large scale shipping even when spread over the course of a year would account for a considerable portion of the useable cargo space on planes destined to eastern points and that potentially even a greater amount of space would be required if Bay Area were to expand its operations to a greater number of shippers and consignees.

Insofar as Bay Area association itself is concerned it is significant that the sole interest of the members is in securing the lowest possible air-freight rates for transportation of their flowers to eastern markets. The Bay Area members are competitors to each other in the sale of flowers and retain *ownership in the shipments until they* are delivered to the consignees. Several Bay Area officers and members testified that Bay Area's rates were from $1 to $2.50 per box less than those of Airborne and stated that their margin of profit on flowers is so small that in many cases it amounts to no more than the savings in air freight costs and that the continuance of Bay Area's service is essential to the retention of their eastern markets. While it may be conceded that some shippers would suffer as a result of being deprived of Respondents' service it must be recognized that this fact alone would not justify the continuance of a service which, unless authorized by the Board, would be illegal. The record discloses that the forwarding operation of Bay Area is not incidental to any other business activity in which it engages. Bay Area does not acquire title to the merchandise received from its members but rather each shipment is individually owned and ultimately each individual shipper or consignee and not Bay Area pays the air freight charges. In these

respects the activities of Bay Area are distinguishable from those of agricultural cooperative associations where the commodities of the several members are commingled into a common mass and where title is relinquished to the association, and the transportation is only incidental to association's main business of growing, marketing, and distributing of agricultural commodities.[19]

It is concluded from the foregoing that Bay Area's operations are characterized by all of the elements indicative of a holding out of service to the public.

Bay Area contends that it is a nonprofit corporation and in support thereof alludes to its articles of association which prohibits the corporation and its members from profiting from its activities. The Enforcement Attorney on the other hand contends that Bay Area is a common carrier regardless of whether it does or does not operate at a profit.

Sections 1 (10) (21) of the Act define air transportation as "* * * the carriage by aircraft of persons or property (in interstate commerce) as a common carrier for compensation or hire * * *," but the term "Compensation or hire" is not defined in the Act. The word "compensation" has been construed by the Interstate Commerce Commission and the courts as meaning a payment for service which does not necessarily include an element of profit,[20] whereas the word "hire" does. The *Schenley* case cited below held that a Schenley subsidiary which performed an

[19] See *McMurray Transportation Service* v. *Burchardi*, 40 C. R. C. R. 403 (1937); *J. Nelson Kagarise*, 42 C. R. C. R. 675 (1940).

[20] *Schenley Contract Carrier Application*, 44 M. C. C. 171 (1944); *Schenley Distillers Corp.* v. *U. S.*, 61 F. S. 981 (1944) (affirmed in 326 U. S. 432 (1946); *Enterprise Trucking Co.*, 2 M. C. C. 264 (1941); *Mountain States Telephone and Telegraph Co.* v. *Project Mutual Telephone and Electric Co.*, P. U. R. 1916 F. 370. (Idaho P. U. C. 1916).

exclusive trucking service for the parent and affiliated Schenley companies was subject to regulation by the Interstate Commerce Commission as a contract carrier as having performed service for compensation even though it was reimbursed by its parent and affiliates for only operating expenses. Bay Area derives its revenues from the sale of manifests, annual dues and from its share of the advance charges on member shipments. The income thus obtained is designed to meet Bay Area's operating expenses including legal fees occasioned by this proceeding and other litigation. The above-cited cases are persuasive of the fact that its services are performed for compensation.

* * * Respondent urges that as a nonprofit association it would be exempt from regulation by the Board under the decision of the Interstate Commerce Commission in the *Barre Granite* case.[21] In support of its claim of applicability of the latter case to this proceeding reference was made by Bay Area to the Board's opinion in the *Air Freight Forwarder* case,[22] and subsequent decisions, in which the Board allegedly adopted in its definition of a freight forwarder by air, the same tenets and limitations prescribed by the Interstate Commerce Commission in Part IV of the Interstate Commerce Act.[23] By this reference Bay

[21] Barre Granite Association, Inc., F. F. Application, 265 I. C. C. 637 (1949).

[22] 9 C. A. B. 473 (1948).

[23] Section 402 (a) (49 U. S. C. 1002).

The specific language of the air freight forwarder case referred to is as follows:

"While express operations date back to the stage coach era of surface transportation in America, the freight forwarders did not come into being until after the advent of the railroad and did not develop fully until the early years of this century. They were first placed under regulation in 1942 when Congress en-

Area implies that since Part 296.1 of the Economic Regulations is patterned after section 402 (a) of the Interstate Commerce Act, the Board in deciding like questions under Part 296 is under a duty to follow the decisions of the Commission and courts in cases arising under aforesaid section 402 (a) irrespective of the positive exemption granted certain classes of shippers and nonprofit associations under section 402 (c) of such Act.

In answering this contention it is not necessary to go beyond the language of section 1 (2) of the Civil Aeronautics Act itself which vests in the Board a broad power of exemption over indirect air carriers without any condition or limitation as to how that power shall be exercised. It is obvious from its language that Congress in writing this provision into the Act intended that the Board should have a broad discretion in exercising its authority thereunder and that it should not be restrained in any manner whatever in its determination in a particular case of whether an exemption should be granted. It is significant that to date the Board has never exercised its discretion to the extent of granting nonprofit shippers

---

acted Part IV of the Interstate Commerce Act, which defines and specifically provides for the regulation of surface freight forwarders. The term 'freight forwarder' is used loosely in common parlance to cover a wide variety of activities in connection with the handling of freight but will be used here in its strictly technical sense, following the specific characteristics of a forwarder as set forth in Part IV of the Interstate Commerce Act. A surface forwarder holds himself out to the general public as a transporter for compensation, of property in interstate commerce assuming responsibility for the same from point of receipt to point of ultimate destination; he assembles and consolidates that property into bulk shipments which, at some terminal point, he breaks up and distributes; he uses the services of an underlying carrier for the whole or some part of the transportation of such shipments."

or associations exemptions from the provisions of the Civil Aeronautics Act, such as is contemplated by section 402 (c) of the Interstate Commerce Act.[24] Accordingly, * * * Bay Area * * * could not avoid regulation by the Board for section 402 (c) of the Interstate Commerce Act has no counterpart either in the Civil Aeronautics Act or the Board's Economic Regulations.

* * * * *

On the basis of the foregoing facts and considerations it is concluded that Bay Area holds itself out to the public as a common carrier to provide transportation of property for compensation * * *.

* * * * *

Order No. E–7139

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board at its office in Washington, D. C., on the 5th day of February 1953

[24] Section 402 (c) reads as follows: "The provisions of this part (Part IV) shall not be construed to apply (1) to the operations of a shipper, or a group or association of shippers, in consolidating and distributing freight for themselves or for the members thereof, on a nonprofit basis, for the purpose of securing the benefits of carload, truckload, or other volume rates, or (2) to the operations of a warehouseman or other shippers' agent, in consolidating or distributing pool cars, whose services and responsibilities to shippers in connection with such operations are confined to the terminal area in which such operations are performed."

Docket No. 4902, et al.

IN THE MATTER OF CONSOLIDATED FLOWER SHIPMENTS, INC.—BAY AREA, ET AL.

Order

A full public hearing having been held in the above-entitled proceeding and the Board, upon consideration of the record, having issued its opinion containing its findings, conclusions and decision, which is attached hereto and made a part hereof;

Upon the basis of such opinion and the entire record herein, and under the authority contained in sections 205 (a) and 1002 (c) of the Civil Aeronautics Act of 1938, as amended;

It is ordered that:

1. Consolidated Flower Shipments, Inc.—Bay Area, its successors and assigns, and John C. Barulich, its executive secretary, and its officers, directors, agents and representatives cease and desist from engaging indirectly in air transportation in violation of section 401 (a) of the Act;

2. This proceeding, insofar as it relates to William Zappettini, other than in his capacity as officer and director of Consolidated Flower Shipments, Inc.—Bay Area, be and it hereby is dismissed.

3. This order shall become effective 12:01 a. m., on March 7, 1953.

By the Civil Aeronautics Board:

[SEAL] (S) Fred A. Toombs,
FRED A. TOOMBS,
Acting Secretary.

U. S. GOVERNMENT PRINTING OFFICE: 1954

No. 13,727

United States Court of Appeals
For the Ninth Circuit

CONSOLIDATED FLOWER SHIPMENTS, INC.—BAY AREA,
Petitioner,

vs.

CIVIL AERONAUTICS BOARD and AIRBORNE FLOWER AND FREIGHT TRAFFIC, INC.,
Respondents.

PETITIONER'S REPLY BRIEF.

ANTONIO J. GAUDIO,
305 Linden Avenue, South San Francisco, California,
Attorney for Petitioner.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Cases

Statutes

No. 13,727

United States Court of Appeals
For the Ninth Circuit

CONSOLIDATED FLOWER SHIPMENTS, INC.—BAY AREA,
Petitioner,

vs.

CIVIL AERONAUTICS BOARD and AIRBORNE FLOWER AND FREIGHT TRAFFIC, INC.,
Respondents.

PETITIONER'S REPLY BRIEF.

PRELIMINARY STATEMENT.

In the interest of clarity in sustaining its position on the instant petition for review, petitioner feels it incumbent to set forth herein that it is not in agreement with the respondent Board in its "counter statement of the case".

First, Bay Area was never organized "on behalf of the consignees of the members" but rather, as stated by witness Alexander (R. 127) his firm and about 25 other growers and shippers in the San Francisco area signed the original papers organizing the association to effect economies for themselves in the

cost of transportation and to better coordinate their shipments.

It is clear that Bay Area was organized by the original nineteen subscribers to the Articles of Association, Incorporation and By-Laws, all of whom were growers-shippers in this area. (Exhibits EA 386, 766 and BA 10.)

Second, Bay Area, as a nonprofit cooperative association, has declined to apply for a letter of registration as a common carrier air freight forwarder for the simple reason that to do so would require it to makes its services available to any and all shippers of flowers (whether producers or not) indiscriminately, and to whomever may wish to use its facilities and services. This it has no desire to do and is prohibited from doing under its Articles and By-Laws, which restricts its membership to producers of horticultural and floricultural products.

Third, the respondent Board ignores the original purpose of the Order of Investigation herein to determine whether or not Bay Area "has engaged or is *(now) engaging* indirectly in air transportation * * *" (R. 5.) The respondent Board recites considerable history *prior to the incorporation of Bay Area* under the general corporation code and prior to October 17, 1952, when it was reincorporated under the Nonprofit Cooperative Association Act as contained in the Agricultural Code of the State of California.

For these reasons we take exception to the emphasis laid by the Board upon the trucker-agent status of one Reynolds, who, long since, is no longer associated with Bay Area; or the operating practices referred to in the Board's counter statement of the case of the remittances by the direct air carriers of funds to the trucker-agent. This ignores the establishment of procedures following conferences with the office of enforcement. (R. 272-274) by which all advance charges due Bay Area were remitted to and deposited in Bay Area's account and from which all operating expenses, including pick-up, trucking and terminal services are paid.

Fourth, petitioner has never contended that common carrier status, if in fact established, can be avoided by any disclaimer of carrier responsibility. There are no agreements in this record between petitioner or its members, attempting to set forth any agreement disclaiming carrier responsibility. However, it is contended by petitioner that the relationship of principal and agent implicit in the cooperative association, eliminates the question of carrier responsibility on the theory of agency, as referred in the *Pacific Coast Wholesalers* case cited in our brief. 338 U.S. 689.

Fifth, in its counter statement, the respondent Board seems to imply that there was a hearing on the merits in the matter of the exemption application (R. 390-394) whereas the fact is that the respondent Board denied any hearing on said application for

exemption and, although it considered the record in the enforcement proceedings in making its findings in the order dismissing the application, (R. 392) it denied petitioner's request for consolidation of its application for exemption, Docket No. 5037, with said Docket No. 4902. (R. 394.) We emphasize this apparent inconsistency in the position of the Board since it is acknowledged (R. 392) that the application for exemption "raised questions of such a complex and controversial nature that they should be *thoroughly* explored in a public hearing," and then concludes to deny the application "without prejudice to the renewal thereof in the formal investigation contemplated" in Docket No. 5947, now in hearing.

In short, we find no justice in the Board's position that to permit petitioner to operate outside the regulatory frame work of the act would be contrary to the public interest in that similar treatment would be required for other such organizations, with possible disastrous consequences to the existing regulated freight forwarder industry. On the same day, February 5th, 1953, it ordered an investigation into the whole question of the indirect carriage of property, naming nine (9) additional shippers' associations of various commodities, in addition to petitioner herein, as respondent without any indication of an intent to issue a cease and desist order against the other nine (9) respondent shipping associations. It is submitted that if the Board is finally concluded on the soundness of its position in issuing an immediate

cease and desist order against petitioner herein, without hearing on its application for exemption, there was little need for petitioner to be joined as a respondent in further proceedings in Docket No. 5947. (R. 406-410.)

ARGUMENT.

I. THE BOARD INCORRECTLY AND ERRONEOUSLY DETERMINED PETITIONER'S STATUS TO BE THAT OF AN INDIRECT AIR COMMON CARRIER.

It is believed that a true definition of the Board's policy on this question is seen in the statement on page 12 of its brief under this point. That is, the Board determined petitioner to be a common carrier primarily on the ground that petitioner's transportation *services are held out and available "through membership" to all growers and shippers* of flowers in the San Francisco area, and on the secondary ground, that its services are held out and available *to all persons who purchase flowers from petitioner's membership.* (Emphasis added.)

It is seen that the emphasis here is on *membership* rather than the operations of petitioner as a bona fide nonprofit cooperative association. This is erroneous and ignores the record.

In the first place, membership is limited to growers as opposed to wholesale shippers of flowers in the San Francisco area, the essential requirement being valid membership in good standing. This was clearly

indicated by the testimony of witness Decia of California Floral Company, which was refused service by Bay Area, having forfeited its membership for nonpayment of dues. (R. 243-244.)

As to the secondary ground, the Board's position again lays emphasis on the relationship between the consignor-seller and consignee-buyer and completely ignores the agency relationship between the member and Bay Area which was deemed, by the Supreme Court of the United States, as the controlling determination against common carrier status as negativing "a holding out indiscriminately to the general public for compensation or hire." *Pacific Coast Wholesalers* case, supra.

In the language of the Court in that case, cited on page 19 of our brief:

> "It is equally clear that the association, as agent for the members, does not 'hold itself out to the general public * * * or provide transportation of property for compensation.' "

It is this agency between the members and the association, rather than the relationship between buyer and seller, on which the Supreme Court relied in ruling that there was no reasonable ground to hold that "it (the association) was holding its services out to the general public".

Under this heading, the respondent Board lays emphasis again on the status of the trucker-agent. As we view this phase of the operation, there are only two methods by which flowers in boxes can be received

by the direct air carrier,—that is for the shipper to deliver them himself or to arrange for a contract drayman to do so. Whether he does it himself or through a contract drayman is of little significance here since the Board's jurisdiction does not extend to highway truck carrier operations, particularly those of a pick-up, delivery and contract drayman. With this the Board will agree.

The respondent Board has cited no authority for the proposition that a shipper or group or association of shippers, lawfully organized on a nonprofit cooperative basis, cannot contract, through their own association for the performance of such pick-up, delivery and terminal services as are necessary in bringing their shipments to the airport. We believe it will be conceded by the Board that it has no jurisdiction to control the arrangements between shippers or association of shippers and their contract draymen for such services.

In this connection, it should be noted tht the operations and practices prevailing at the time of Reynolds as trucker, have long since been discontinued and do not constitute the Bay Area's operation at the present time nor at the time of the conclusion of the hearing in this proceeding.

In any event, as to alleged solicitation, a close review of the direct and cross-examination of each of the witnesses called by the enforcement attorney, in seeking to establish "solicitation of members" was completely discounted. See, for example, witness

Nuckton (R. 495), witness Tal Lloyd (R. 269). (Note: Witness Zappettini at R. 504, apparently confused the status of membership with that of traffic or solicitation of business, but a reading of his entire line of testimony discounts any evidence of solicitation of traffic or membership by the association as such.)

The respondent Board has made reference to numerous letters written by the individual members to their several customer receivers in destination territory, in which they seek to resolve their transportation problems, particularly on the question as to who is to bear the transportation costs, and the establishment and improvement of local drayage service in destination territory. We submit that this is sound business practice by persons in the floral industry in seeking to secure the prompt, less costly, and more direct transportation and delivery of their products through their own association. This falls far short of an "alleged public carrier soliciting traffic from the general public". Moreover, it again lays emphasis on the dealings between the member and his receiver and ignores the status of principal and agent between the association on the one hand and its several members on the other.

The so-called "publicity campaign" such as identifying labels on boxes, affiliate membership in the Society of American Florists, and the common everyday amenities of business practices, again ignores the fact that in the last analysis no single shipment of flowers in boxes will move in the association's service

except at the behest of the member in meeting his customer demands, no more than such member might do individually on his own account, if more costly!

If the petitioner's penetration of the San Francisco market, as asserted, has been substantial, it is only out of realization by the producer and grower of cut flowers and decorative greens of the benefits that redound to him as a producer in arranging for his shipments on a cooperative basis, as recognized by the Nonprofit Cooperative Association Act of the State of California.

The second point of the respondent Board, that petitioner's activities are those of a "common carrier" again involves some of the considerations hereinabove expressed. Whatever the limitations on petitioner's membership may be under the Agricultural Code, yet, in the view of the Supreme Court, there is not a "holding out of its services to the general public". Again, this argument of the Board emphasizes the degree and ignores the principle involved. On this point, if the Board, in the exercise of a sound discretion, while exercising quasi judicial functions, had granted petitioner's petition for reconsideration, rehearing and reargument, and granted further hearing herein instead of denying further hearing, which denial is herein assigned as error, the question of what it can or cannot do under its corporate charter or its declared purposes, or what it in fact does do, as a nonprofit cooperative association, could have

been fully explored, as is now being fully explored, in the course of the hearing in Docket No. 5947.

We do not believe that the answer can be found in the simple assertion that whether a transportation agency is a common carrier depends not upon its corporate charter or declared purposes, but upon what it does, "without fully exploring, on rehearing for example, what petitioner, as a nonprofit cooperative association does in fact do and for whose account."

In response to this argument, petitioner wishes to point out that the existence or nonexistence of so-called "exemption" provisions, or "exclusion" provisions in the Civil Aeronautics Act, is not controlling. If petitioner can validly be held to be a common carrier in the indirect carriage of property, on the record here presented, the existence or not of such a provision would become pertinent. To look to the nonexistence of such exemption provision as basis for holding of common carrier status is to answer the question before deciding it. If petitioner is not a common carrier, this conclusion alone would afford a complete answer to the Board's order of cease and desist. That, in substance, is the only real question on this petition for review.

We believe we have answered the charge of solicitation both as to membership and "receiver" by an analysis of the testimony of witnesses called by the enforcement attorney on this question.

So far as the Bay Area membership is concerned, there is no provision in the Civil Aeronautics Act that prohibits dealings and negotiations between buyer and seller. The members, in seeking to satisfy their customer demands, arrange to deliver them through the agency of their shipping association, and the goods are shipped by the association as agent for the member. In the mass of documentary evidence received, not one was presented showing a demand for service by the receiver upon the petitioner as shipper. We find no distinction here against the holding that arrangements between the association and its members which makes it possible for the association to pass on savings to them, does not constitute a holding out to the nonmember, i.e. the consignee receiver, the obverse of the situation in *Pacific Coast Wholesalers* case. Naturally, a saving will result to the consignee as well as the consignor-member, if transportation costs are held to a minimum through cooperative shipping; but we fail to see the logic in the contention that such savings realized by consignees constitutes a holding out of service to them in the light of the Supreme Court's decision in the *Pacific Coast Wholesalers* case, supra.

In conclusion on this phase of the respondent's argument, we would like to propound this question: Is it an insurmountable or impossible barrier for the Board to have specified in its order that:

1. Petitioner cease any and all correspondence in behalf of its members? or,

2. That petitioner limit its membership to any given number? or,

3. That petitioner eliminate the so-called "publicity campaign" outlined on page 16 of respondent's brief? or,

4. That petitioner discontinue the extension of the "advance charge" for either (a) consolidation services, or (b) pick-up, trucking and terminal services, or both?

If this cannot or will not be done, is not the legal effect of the cease and desist order in this case an attempt to syphon off the savings and economies realized by the industry and labor of flower growers and producers and, in the words of one eminent jurist, "pass them into the pockets of an air freight forwarder", enjoying common carrier status, serving the public indiscriminately for compensation or hire, as well as for profit?

We respectfully submit that a reasonable answer to these questions conclusively establishes petitioner's status as a bona fide non-profit cooperative association of producers and shippers of flowers handling freight for themselves and none other, and that under the authorities cited, petitioner is not a common carrier in the indirect carriage of property, subject to the jurisdiction of the Board.

II. THE BOARD'S CEASE AND DESIST ORDER IS VOID FOR UNCERTAINTY.

On this point petitioner is not seeking from the Board any definition of common carrier status. What it desires to have is some notice in its order as to the specific acts which it would have petitioner cease from doing as in violation of §401a of the Act.

If it is not any one of the items mentioned above or in our brief, then to what portion of its opinion and decision must the petitioner look to determine any unlawful act on its part?

To state it differently, if it is all of such practices, then they should be specifically set out in the order. Reason and logic should not require petitioner in a bona fide attempt through its members to avail themselves of the benefit of volume rates to be subjected to the "sword of Damocles", so to speak, of such an uncertain order.

The Board has cited no authority contrary to the ruling in *Illinois etc. Co. v. State Public Utilities Commission,* 245 U.S. 493.

Moreover, *Brady Transfer and Storage Co. v. United States,* 80 F. Supp. 110 (35 U.S. 865) is not in point for the simple reason that the carrier there involved was concededly subject to the Commission's jurisdiction holding an irregular route certificate. In such case, it is a simple matter by definition to refer to the irregular route certificate to determine the exact limit and extent of the carrier's authority, be-

yond which a simple direction or cease and desist would be sufficient.

We are not on this question concerned with the *report* or the *opinion* of the Board; rather, petitioner should be informed of the terms and conditions for any violations of which a penalty or injunction could be invoked, if a violation thereof in fact occurred.

III. REFUSAL OF THE BOARD TO STAY THE EFFECTIVENESS OF THE CEASE AND DESIST ORDER UNTIL COMPLETION OF THE AIR FREIGHT FORWARDER INVESTIGATION CASE, CONSTITUTED AN ABUSE OF DISCRETION.

We believe that the petitioner's argument on this point is fully covered in its opening brief herein. We merely wish to emphasize here that the Board in this proceeding has exercised quasi judicial functions and as such, any final order is reviewable on the authorities cited.

This petition for review must determine if a bona fide effort on the part of flower growers, producers and shippers to band together for the valid purpose of effecting economies in the distribution and shipping of their products must be eliminated simply because of the fear of the Board that other similar organizations, with like lawful purposes, may be formed.

It is difficult to appreciate how the members of Bay Area have any lack of confidence in their ability to ship cooperatively. There is no appropriation of a substantial part of the Air Freight Forwarding busi-

ness in such case. Further, we believe we have established that every reason and justice in the case requires a suspension of any definitive order until the conclusion of the *Air Freight Forwarder Investigation* case in Docket No. 5947.

It is appropriate to ask at this point, which of the public interests requires the exercise of a sound discretion, avoiding the chaos and irreparable damage that would be suffered by the flower producers and shippers which comprise the Bay Area membership, whose deprivation of cooperative action undertaken pursuant to the authority of Agricultural Code, may seriously prejudice the economy and well being of their industry, or enhancing diminishing revenues and profits of a common carrier, air freight forwarder?

Petitioner is participating in the preparation of a full and complete record in Docket No. 5947 from which it is hoped a reasonable and equitable solution will result. It does not appear to us to be equality of treatment to single out petitioner in an enforcement proceeding and permit nine (9) other shipping associations to continue service to *their* members, while future policy is being determined in Docket No. 5947 before the Board.

We submit that on all of the facts and the evidence in this record, the Board's refusal to suspend the cease and desist order, pending the conclusion of the Air Freight Forwarder Investigation, will result in

prejudice to the flower industry represented by the Bay Area membership and thus constitutes an abuse of a sound discretion and authority invested in the Board by §1005(d) of the Act.

Dated, South San Francisco, California,
March 30, 1954.

Respectfully submitted,
ANTONIO J. GAUDIO,
Attorney for Petitioner.

No. 13,727

United States Court of Appeals

For the Ninth Circuit

CONSOLIDATED FLOWER SHIPMENTS, INC.—BAY AREA,

Petitioner,

vs.

CIVIL AERONAUTICS BOARD and AIRBORNE FLOWER AND FREIGHT TRAFFIC, INC.,

Respondents.

PETITION FOR REHEARING.

ANTONIO J. GAUDIO,
305 Linden Avenue, South San Francisco, California,
Attorney for Petitioner.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Table of Authorities Cited

Cases

Codes

Miscellaneous

No. 13,727

United States Court of Appeals
For the Ninth Circuit

CONSOLIDATED FLOWER SHIPMENTS, INC.—BAY AREA,
Petitioner,

vs.

CIVIL AERONAUTICS BOARD and AIRBORNE FLOWER AND FREIGHT TRAFFIC, INC.,
Respondents.

PETITION FOR REHEARING.

To the Honorable William Denman, Chief Judge, and to the Honorable Associate Judges of the United States Court of Appeals for the Ninth Circuit:

Comes now petitioner, Consolidated Flower Shipments, Inc.—Bay Area, and petitions the above entitled Court for a rehearing of its opinion and decision, filed herein June 9, 1954, on the following grounds:

1. Said opinion is in conflict with the decision of the Supreme Court of the United States in *U. S. v. Pacific Coast Wholesalers Association,* 338 U.S. 689.

2. The Court erred in its holding that no contention is here made that the Civil Aeronautics Act

invests the Board with jurisdiction over petitioner's operations.

3. The Court erred in holding that petitioner controls any shipments of the flowers of its members out of the San Francisco Bay area.

4. The Court erred in concluding that petitioner may, without impediment, apply for a letter of registration as a common carrier air freight forwarder.

5. The Court erred in its interpretation and construction of §1(2) read in conjunction with §1(10)(21), defining air carriers "subject to the Act."

6. The Court erred in its review in not distinguishing the Board's order as to past and present operations of petitioner as "having been or now in violation" of §401a of the Act as an air freight forwarder.

7. The Court erred in denying petitioner's motion to suspend or abate the review in these proceedings pending the conclusion of Docket No. 5947 and the legislative process on H.R. 6310, 83rd Congress.

ARGUMENT.

In submitting its first ground for rehearing, petitioner respectfully submits that the Court has fallen into error in not properly apprizing the careful distinction which was drawn by the Supreme Court in its decision in the *Pacific Coast Wholesalers* case, supra. To hold that the lack of an express exemption provision *ipso facto* invests petitioner with a common carrier status as an air freight forwarder, is to decide

the very question at issue before consideration of the law as applicable to this record.

Section 1002(a) of Title 49, U.S.C. defines a freight forwarder as any person which holds itself out to the general public as a common carrier to transport or provide transportation of property * * * for compensation and which in the ordinary and usual course of its undertaking affiords the service which Bay Area as a cooperative affords to its members.

As is the case here, if the existence or not of an express exemption provision were material in the *Pacific Coast Wholesalers* case, there would have been no necessity for decision. The point which the Court endeavored to reconcile was whether, apart from its exempt status under the freight forwarders' act, the Pacific Coast Wholesalers Association was rendering a service to the general public as a common carrier freight forwarder, it being contended by the Commission that insofar as its service was made available to nonmembers as shippers, their payment or assumption of the obligation to pay the transportation charges constituted a holding out to the general public as a common carrier for compensation. On this score, the District Court said:

> "And the facts found by the Commission admit of but one conclusion as to this: that the association at all times acts solely at the request, and under the direction, and for the account and benefit of the member-purchaser. As between member and association, then, the former always acts as principal, the latter as agent.

> '* * * All of the shipments involved are consigned * * * upon instructions of the members of the association. Admittedly, the facilities of the association are not available to a nonmember shipper otherwise than through arrangements made by a member. And the necessary arrangements are that the member as principal instruct the association as agent to handle the shipment. Moreover, both the purpose and the result of the transaction is not to benefit the shipper, but to reduce transportation costs to the member through savings effected in cooperation with other members who likewise employ the association as transportation agent.' "
>
> "When this principal-agent relationship between member-purchaser and the association is borne in mind, it is clear that there is no profit to the association from the activity described in the Commission's report, 49 U.S.C. §1002(c). And it is equally clear that the association, as agent for the members, does not 'hold itself out to the general public to provide transportation of property for compensation.' " 49 U.S.C. §1002(a)(5).

Having come to this conclusion on the interpretation of §1002(a)(5) that the operation is not such as being held out to the general public to provide transportation of property for compensation, there was no occasion to determine *in that case* whether the exemption provisions contained in §1002(c) need be construed or applied. It was not common carriage.

Reviewing the above cited decision of the District Court, the Supreme Court on certiorari affirmed this holding with the following language:

> "The court considered as decisive that no shipments by the association were ever undertaken except at the behest and for the benefit of a member. Looking to the agency between member and association, rather than that between buyer and seller, the court saw no reasonable ground for ruling that the association was on a profit basis, *or that it was holding its service out to the general public.* We agree." (Emphasis ours.)

In reviewing the Board's legal conclusions from the record in this case, petitioner feels that the close analogy between the language in §401a of the Civil Aeronautics Act and §1(2)(21) thereof, when compared with the language before the Court in the *Pacific Coast Wholesalers* case, reasonably permits of only one conclusion, namely, that Bay Area, as a transportation agent in behalf of its members on a cooperative basis, does not "hold itself out to the general public to provide transportation of property for compensation in interstate air transportation".

In conclusion on this point, following the decision of the Supreme Court in the *Pacific Coast Wholesalers* case, the 81st Congress approved, on December 20, 1950, an amendment to subsec. a(5) above mentioned by adding, following the words "general public" the words "as a common carrier", which, according to the House Committee report, was "to remove any anomally and confusion regarding the status of freight forwarders and make clear that they have the status of common carriers."

In short, the asserted "public nature" of petitioner's operations can be likened to the operations of a shipping association under the freight forwarder act prior to the 1950 amendment, when some confusion prevailed as to whether the term "general public" might be deemed controlling as opposed to the status, in fact and in law, of a common carrier. To resolve this doubt, following the decision in the *Pacific Coast Wholesalers* case, the term "common carrier" was written into the freight fowarder's act, surface, thus writing into the act the effect of the Court's decision that there must be a holding out to the general public to provide transportation of property for compensation, i.e., the status must be that of a common carrier.

Comparing this legislative language and interpretation to the Civil Aeronautics Act providing in §1(2) that an air carrier is one who undertakes to engage in air transportation, defined in §1(21), as meaning the carriage by aircraft by persons or property as a common carrier for compensation or hire, the history of the *Pacific Coast Wholesalers* case, impels, therefore, the conclusion that the public nature of the operations is not controlling on a question such as is now before the Court, namely, a determination of common carrier status. We respectfully feel that the operations of the Bay Area cooperative are so closely analogous to that of the *Pacific Coast Wholesalers* case that there can be no rational or reasonable ground for ruling that the association is on a profit basis or that it is holding out its service to the gen-

eral public, and that the conclusion of the Board on this score should be reversed.

On the second point of assigned error, we call to the Court's attention that nowhere in the Act is the term "public in nature" to be found. The proposition requires no citation of authority, we believe, that public carriage may be other than common, according to the circumstances. In stressing the importance of *Natural Gas Service Co. v. Serve-Yu Cooperative,* 70 Arizona 235, 219 Pacific 2d 324, the Court failed to distinguish between direct carriers, holding, maintaining and operating its air line equipment and indirect carriers, which conceivably, need not own, maintain or operate aircraft. Moreover, in the field of public utility service, such as gas, fuel and water, the simple ownership, maintenance and operation of the facility has, by statutory enactment, caused such operations to be classed as public service corporations subject to regulation, irrespective of the particular undertaking and whether the same is limited or unlimited. The nature of the operation itself is determinative, in the view of the legislature, as to require public regulation. We have no concept in the Civil Aeronautics Act other than the question of an unrestricted holding out of service to the general public as a common carrier to provide transportation for compensation or hire. Moreover, the decision in the *Natural Gas Service Co.* case again looks to the relationship between the association and the public served rather than the relationship between the members of the

association, the particular distinction drawn by the Supreme Court in the *Pacific Coast Wholesalers* case.

On the third point of assigned error, we wish to make but brief further reference to the distinction in the *Pacific Coast Wholesalers* case, that in Bay Area's operation, all of the shipments involved are consigned upon instruction of the members "of the association". The cooperative as such has no control over the number or amount of shipments that move through the cooperative, that fact being determined by members on appropriate instructions to the cooperative.

The fourth point of assigned error, we believe, is a failure to fully appreciate the purpose of a nonprofit cooperative association of agricultural producers, not the least of which is "to make the distribution of agricultural products between producer and consumer as direct as can be efficiently done by handling and shipping the products of the members on a cooperative basis." See §1190 and §1193, Agricultural Code of the State of California.

To assume the status of a common carrier air freight forwarder as the Board would have us do, and thereby enter into the open and competitive business of air transportation to any and all persons or shippers of flowers who may see fit to utilize Bay Area service, would certainly favor the regulation of common carrier air freight forwarders, but it would defeat the very purpose of the member-producers of the cooperative. Such a common carrier undertaking would threaten a recurrence of the very evils which the members, on a cooperative basis, have sought to

avoid in the handling of such a highly perishable commodity as flowers and decorative greens.

In its fifth assignment of error, petitioner again points up the limitation of the Civil Aeronautics Act to common carriage. In the early decisions before the Board, in construing the language of §1(2)(10)(21) of the Act, defining "air carrier" the entire context and purpose of the Act has the effect of dividing air carriers into two classes:

1. Those who engage directly in the carriage by aircraft of property, persons or mail (not here involved);
2. Those who engage indirectly or by lease or some other arrangement in the carriage by aircraft of persons, property or mail.

Whether the undertaking be direct or indirect, the engagement must be the carriage of persons, property or mail by aircraft *as a common carrier. Railway Express Agency, Inc.,* 2 CAB 531.

Petitioner's sixth and seventh assignments of error refer in part to the second and third points of review as discussed in our briefs. While we feel that perhaps there is no requirement on the part of the Board to expressly inform petitioner how far it can go *without* breaking the law, we respectfully submit that the Board should be called upon to cite petitioner in what circumstances *it is* violating the provisions of §401(a) of the Act. If the cease and desist order of the Board would require Bay Area to cease its operation "as now conducted", does this have refer-

ence to its method of operation prior to the order of investigation herein; or, as it was developed in the record on the conclusion of the hearings; or, as it was argued, aliunde, at oral argument with reference to the nonprofit cooperative association? Or is it not, rather, a holding that any so-called forwarder operation must submit to regulation by the Board, whether it constitutes common carriage or not? If it is the former, then we must respectfully submit that the lack of specificity in the order makes it invalid of enforcement. If the latter, then clearly we are reading into the Civil Aeronautics Act that which the Congress never intended, namely, that non-common carrier operations will be regulated.

In the last analysis, and on the seventh assignment of error, it is difficult for us to reconcile the desire of the Civil Aeronautics Board to classify some sort of status as an exempt operation by non-profit cooperative associations of shippers, particularly in the agricultural field, and its refusal to accord a stay of its cease and desist order pending the conclusion of the hearing in Docket No. 5947. If the Board on its own motion assumes that there may be a clear distinction between nonprofit cooperative associations of shippers and general common carrier operations, it would not appear to be in the public interest to destroy a valid cooperative effort undertaken as permitted by law in the Agricultural Code, while consideration for administrative exemption or legislative exemption under H.R. 6310, is pending.

It is respectfully submitted therefore, that the Court grant Petitioner a rehearing in the subject proceeding and thereupon set aside the Board's orders under review and that final disposition of these proceedings be abated pending the conclusion of Docket No. 5947 or the enactment of H.R. 6310 into law.

Dated, South San Francisco, California,
June 28, 1954.

ANTONIO J. GAUDIO,
Attorney for Petitioner.

Certificate of Counsel

The undersigned counsel for the Petitioner in the within entitled proceeding does hereby certify that in his judgment it is well founded and that it is not interposed for delay.

Dated, South San Francisco, California,
June 28, 1954.

Antonio J. Gaudio,
Counsel for Petitioner,

No. 13729

United States Court of Appeals
for the Ninth Circuit.

GEORGE FRENCH, JR., and MARY E. FRENCH,

Appellants,

vs.

HAROLD A. BERLINER, Former Collector of Internal Revenue,

Appellee.

Transcript of Record

Appeals from the United States District Court, Northern District of California, Northern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—7-10-53

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

INDEX PAGE

NAMES AND ADDRESSES OF ATTORNEYS

SHERWOOD & LEWIS,
CLYDE C. SHERWOOD;
703 Market Street,
San Francisco, Calif.,

Attorneys for Plaintiffs.

CHAUNCEY TRAMUTOLO,
United States Attorney;
CHARLES ELMER COLLETT,
WILLIAM H. LALLY;
Assistant U. S. Attorneys;

Attorneys for Defendants.

In the Northern Division of the United States District Court for the Northern District of California

No. 6257

GEORGE FRENCH, JR.,

Plaintiff,

vs.

JAMES G. SMYTH, Collector of Internal Revenue,

Defendant.

COMPLAINT FOR REFUND OF INCOME TAXES ILLEGALLY COLLECTED

Now comes the above-named plaintiff and complains of the above-named defendant and for cause of action alleges as follows, to wit:

I.

That said defendant, James G. Smyth, is a resident of the City and County of San Francisco, State of California; that defendant, James G. Smyth is now, and at all times relevant herein, has been the duly appointed, qualified and acting Collector of Internal Revenue for the First Collection District of California; that the Court has jurisdiction over this matter under the provisions of Title 28, Sec. 1340, United States Code.

II.

That said plaintiff is now and at all times herein mentioned, has been a citizen of the United States of America, and resident of the City of Stockton,

County of San Joaquin, State of California, and within the said Northern District of California. That at all times material to this proceeding, plaintiff was married and his wife's name is Mary E. French, that during all such times all income received by plaintiff was community income and was reported by plaintiff and his said wife on a community basis, each filing a separate income tax return for the year 1943, and all prior years herein mentioned. That within the time allowed by law therefor, plaintiff and his said wife have caused to be prepared, executed and filed with said defendant, their respective income tax returns for the year 1943; that at all times herein mentioned plaintiff kept his books of account and filed his income tax returns on the calendar year basis and on the cash basis of accounting.

III.

That at all times during the period from November 15, 1938, to May 31, 1943, Oranges Brothers Construction Department, was a partnership carrying on a general contracting business at Stockton, California; that at all said times plaintiff was employed as Supperintendent of construction by said Oranges Brothers Construction Department. That such employment was on a fixed salary and commission basis under an agreement of employment whereby plaintiff was to receive a fixed salary of $150.00 per month, and also was entitled to receive one-half (½) of the net profits of said construction and contracting business. That plaintiff received

for his personal services under said contract of employment, a total compensation of $429,196.69, of which 4.85 per cent, or $20,827.87 was received prior to January 1, 1943, and 95.15 per cent, or $408,368.82 was received during the taxable year 1943, to wit:

> The sum of $75,062.50 on February 8, 1943; and $333,306.32 after May 31, 1943.

That plaintiff, in filing his income tax return for the year 1943, computed his tax on said two payments received in 1943, in accordance with the provisions of Internal Revenue Code, Section 107(a), allocating each payment over the period of service preceding the receipt of such payment which comprised fifty-one and fifty-five months, respectively.

That as so computed, plaintiff's total income and Victory tax liability for the taxable year of 1943 on all income received from his employment by Oranges Brothers Contruction Department and from other sources amounted to $69,150.12. That the Commissioner of Internal Revenue erroneously assessed a total income and Victory tax liability for said year of 1943, in the amount of $97,293.22, and erroneously assessed a deficiency of $32,718.59 consisting of taxes in the amount of $28,143.10 and interest in the amount of $4,575.49. That said erroneously assessed deficiency in the amount of $32,-718.59 was paid in full by the plaintiff to the defendant, as Collector of Internal Revenue for the First Collection District of California, on the following dates, to wit:

$27,779.18 on November 26, 1946;
$4,939.41 on June 5, 1947.

IV.

That on the 28th day of December, 1948, and within the time allowed under the provisions of IRC Sec. 322(b) (3), plaintiff caused to be prepared, executed and filed a claim for the refund of said sum of $32,718.59 illegally assessed by the Commissioner of Internal Revenue and illegally collected by the defendant on the above said dates; that a copy of said refund claim, marked Exhibit "A" is annexed hereto and incorporated herein with the same force and effect as if here set forth in haec verba. That said refund claim was disallowed by the Commissioner of Internal by notice dated November 7, 1949, under Symbol No. IT:CL:CC:Rej.

V.

That no part of said sum of $32,718.59 ever was or is legally owing or payable to the said defendant as and for an income tax of plaintiff for the calendar year 1943, or for any period, or otherwise, or at all. That said amount and the whole thereof, was erroneously collected by defendant from plaintiff; that no part of said sum has been repaid or scheduled for refund to plaintiff, and the whole thereof, together with interest thereon from the time it was paid to the defendant is now due, owing and unpaid from defendant unto plaintiff.

Wherefore, plaintiff prays for judgment in his favor and against the defendant, in the sum of

$32,718.59, together with interest on said sum from the respective dates of payment, pursuant to the provisions of IRC Sec. 3771, and for such other and further relief as the Court may find meet and just in the premises.

/s/ CLYDE C. SHERWOOD,

/s/ JOHN V. LEWIS,

Attorneys for Plaintiff.

Exhibit A

Form 843
Treasury Department
Internal Revenue Service
(Revised July, 1947)

Claim

To Be Filed With the Collector Where Assessment Was Made or Tax Paid

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse.

[ ] Refund of Taxes Illegally, Erroneously, or Excessively Collected.

[ ] Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

[ ] Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

State of California,
County of San Joaquin—ss.

Name of taxpayer or purchaser of stamps: George French, Jr.
Business address: Post Office Box No. 307, Stockton 100, California.
Residence: Stockton, California,

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed: First District of California (94).
2 Period (if for tax reported on annual basis, prepare separate form for each taxable year) from Jan. 1, 1943, to Dec. 31, 1943.
3. Character of assessment or tax: income and victory taxes.
4. Amount of assessment, $97,293.22; dates of payment during 1943; 11/26/1946; 6/5/1947.
5. Date stamps were purchased from the Government:
6. Amount to be refunded: Taxes, $28,143.10, interest, $4,575.49, total $32,718.59.
7. Amount to be abated (not applicable to income, gift, or state taxes)..... $.....
8. The time within which this claim may be legally filed expires, under section 322 of Internal Revenue Code on December 31, 1948.

The deponent verily believes that this claim should be allowed for the following reasons:

The claimant was assessed in error deficiences in income and victory taxes for the taxable period shown above, which were paid in full on November 26, 1946, and June 5, 1947, on the basis of a report of internal revenue agent Robert L. Driscoll dated July 5, 1945, and a conference statement under the symbols "IRA: Conf./HVH" issued by the office of the internal revenue agent in charge at San Francisco, California, under date of February 25, 1947, which report and statement are incorporated herein by reference. The whole amount of the deficiencies, $28,143.10 is claimed for refund with the interest paid thereon, $4,575.49, together with the interest on the total overpayment claimed for refund according to law.

The claimant claims specifically as a basis for the refund claimed herewith that his Form 1040 income and victory tax return for the calendar year 1943, showing a total income and victory tax liability of $69,150.12, and his amended Form 1040 income tax return for the calendar year 1942, were in all respects true and correct returns of his taxable income and victory taxes for those years, and that the assessments of deficiencies on the said return for the calendar year 1943 were, with reference to the report and statement described above and incorporated herein by reference, based on the following errors:

(1) The disallowance of the application of the provisions of section 107, Internal Revenue

Code, in limitation of his income and victory tax liability on compensation for services received in 1943 for services during and for a period of more than 36 months, as computed in his said return for 1943;

(2) The computation of his income from services during the years 1942 and 1943 on the theory that, and as if he had been a member of a partnership, Oranges Brothers Construction Division; and

(3) In the alternative to the assignments of error 1) and 2) above, the failure of the said report and statement to allow in the computation of victory tax net income for the year 1943 a deduction for California income taxes on the amounts considered and treated in the said report and statement to be distributive income from the said partnership.

The verification of this claim by the undersigned agent is authorized by the claimant's power of attorney made August 31, 1946, and filed thereafter in the office of the internal revenue agent in charge at San Francisco, California, a signed and verified copy of which power is attached hereto.

GEORGE FRENCH, JR.,
By /s/ FRANK C. SCOTT,
His Attorney-in-Fact.

Subscribed and sworn to before me this 28th day of December, 1948.

[Seal] /s/ MARGARET E. JARDINE,
Notary Public.

Duly verified.

[Endorsed]: Filed December 9, 1949.

In the Northern Division of the United States District Court for the Northern District of California

No. 6258

MARY E. FRENCH,

Plaintiff,

vs.

JAMES G. SMYTH, Collector of Internal Revenue,

Defendant.

COMPLAINT FOR REFUND OF INCOME TAXES ILLEGALLY COLLECTED

Now comes the above-named plaintiff and complains of the above-named defendant and for cause of action alleges, as follows, to wit:

I.

That said defendant, James G. Smyth, is a resident of the City and County of San Francisco, State of California; that defendant, James G. Smyth, is now, and at all times relevant herein has been the duly appointed, qualified and acting Collector of Internal Revenue for the First Collection District of California; that the Court has jurisdiction over this matter under the provisions of Title 28, Sec. 1340, United States Code.

II.

That said plaintiff is now and at all times herein mentioned, has been a citizen of the United States

of America, and a resident of the City of Stockton, County of San Joaquin, State of California, and within the said Northern District of California. That at all times material to this proceeding, plaintiff was married, and her husband's name is George French, Jr.; that during all such times all income of plaintiff was derived from community income which was reported by plaintiff and her husband on a community basis, each filing a separate income tax return for the year 1943, and all prior years herein mentioned. That within the time allowed by law therefor, plaintiff and her said husband have caused to be prepared, executed and filed with said defendant, their respective income tax returns for the year 1943; that at all times herein mentioned plaintiff kept her books of account and filed her income tax returns on the calendar year basis and on the cash basis of accounting.

III.

That at all times during the period from November 15, 1938, to May 31, 1943, Oranges Brothers Construction Department was a partnership carrying on a general contracting business at Stockton, California; that at all times plaintiff's husband was employed as Superintendent of construction by said Oranges Brothers Construction Department. That such employment was on a fixed salary and commission basis under an agreement of employment whereby plaintiff's husband was to receive a fixed salary of $150.00 per month, and also was entitled to receive one-half of the net profits of said con-

struction and contracting business. That plaintiff's husband received for his personal services under said contract of employment, a total compensation of $429,196.69, of which 4.85 per cent or $20,827.87 was received prior to January, 1943, and 95.15 per cent, or $408,368.82 was received during the taxable year 1943, to wit:

The sum of $75,062.50 on February 8, 1943; and $333,306.32 after May 31, 1943.

That plaintiff, in filing her income tax return for the year 1943, computed her tax on her community share of said two payments received in 1943, in accordance with the provisions of Internal Revenue Code Section 107(a), allocating each payment over the period of service preceding the receipt of such payment by her husband, which comprised fifty-one and fifty-five months, respectively. That as so computed, plaintiff's total income and Victory tax liability for the taxable year of 1943 on all income taxable to her amounted to $69,149.54. That the Commissioner of Internal Revenue erroneously assessed a total income and Victory tax liability for said year of 1943 in the amount of $97,291.87, and erroneously assessed a deficiency of $32,717.65 consisting of taxes in the amount of $28,142.33 and interest in the amount of $4,575.32. That said erroneously assessed deficiency in the amount of $32,-717.65 was paid in full by the plaintiff to the defendant, as Collector of Internal Revenue for the First District of California, on the following dates, to wit:

$27,779.18 on November 26, 1946;
$4,938.47 on June 5, 1947.

IV.

That on the 28th day of December, 1948, and within the time allowed under the provisions of IRC Sec. 322(b)(3), plaintiff caused to be prepared, executed and filed a claim for the refund of the said sum of $32,717.65 illegally assessed by the Commissioner of Internal Revenue and illegally collected by the defendant on the above said dates; that a copy of said refund claim, marked Exhibit "A" is annexed hereto and incorporated herein with the same force and effect as if here set forth in haec verba. That said refund claim was disallowed by the Commissioner of Internal Revenue by notice dated November 7, 1949, under Symbol No. IT:Cl:CC:Rej.

V.

That no part of said sum of $32,717.65 ever was or is legally owing or payable to the said defendant, as and for an income tax of plaintiff for the calendar year 1943, or for any period, or otherwise, or at all. That said amount and the whole thereof, was erroneously collected by defendant from plaintiff; that no part of said sum has been repaid or scheduled for refund to plaintiff, and the whole thereof, together with interest thereon from the time it was paid to the defendant is now due, owing and unpaid from defendant to plaintiff.

Wherefore, plaintiff prays for judgment in her favor and against the defendant, in the sum of $32,717.65, together with interest on said sum from the respective dates of payment, pursuant to the provisions of IRC Sec. 3771, and for such other and

further relief as the Court may find meet and just in the premises.

/s/ CLYDE C. SHERWOOD,

/s/ JOHN V. LEWIS,

Attorneys for Plaintiff.

EXHIBIT A

Form 843
Treasury Department
Internal Revenue Service
(Revised July, 1947)

Claim

To Be Filed With the Collector Where Assessment Was Made or Tax Paid

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse.

[ ] Refund of Taxes Illegally, Erroneously, or Excessively Collected.

[ ] Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

[ ] Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

State of California,
County of San Joaquin—ss.

Name of taxpayer or purchaser of stamps: Mary E. French.

Business address: Post Office Box No. 307, Stockton 100, California.
Residence: Stockton, California.

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed: First District of California (94).
2. Period (if for tax reported on annual basis, prepare separate form for each taxable year) from Jan. 1, 1943, to Dec. 31, 1943.
3. Character of assessment or tax: Income and victory taxes.
4. Amount of assessment, $97,291.87; dates of payment during 1943: 11/26/1946; 6/5/1947.
5. Date stamps were purchased from the Government .....
6. Amount to be refunded: Taxes, $28,142.33; interest, $4,575.32; total, $32,717.65.
7. Amount to be abated (not applicable to income, gift, or estate taxes) ..... $.....
8. The time within which this claim may be legally filed expires, under section 322 of Internal Revenue Code on December 31, 1948.

The deponent verily believes that this claim should be allowed for the following reasons:

The claimant was assessed in error deficiencies in income and victory taxes, for the period shown above, which were paid in full on November 26, 1946, and June 5, 1947, on the basis of a report of internal revenue agent Robert L. Driscoll dated July 5, 1945, and a conference statement under the

symbols "IRA:Conf./HVH" issued by the office of the internal revenue agent in charge at San Francisco, California, under date of February 25, 1947, which report and statement are incorporated herein by reference. The whole amount of the deficiencies, $28,142.33, is claimed for refund with the interest paid thereon, $4,745.32, together with interest on the total overpayment claimed for refund according to law.

The claimant claims specifically as a basis for the refund claimed herewith that her Form 1040 income and victory tax return for the calendar year 1943 showing a total income and victory tax liability of $69,149.54, and her amended Form 1040 income tax return for the calendar year 1942, were in all respects true and correct returns of her taxable income and income and victory taxes for those years, and that the assessments of deficiencies on the said return for the calendar year 1943 were, with reference to the report and statement described above and incorporated herein by reference, based on the following errors:

(1) The disallowance of the application of the provisions of section 107, Internal Revenue Code, in limitation of her income and victory tax liability on compensation for her husband's services (in which the claimant had a community property interest) received in 1943 for services during and for a period of more than 36 months, as computed in his and her income and victory tax returns for 1943;

(2) The computation of her income from

her husband's services during the years 1942 and 1943 on the theory that, and as if her said husband had been a member of a partnership, Oranges Brothers Construction Division; and

(3) In the alternative to the assignments of error 1) and 2) above, the failure of the said report and statement to allow in the computation of victory tax net income for the year 1943 a deduction for California income taxes on the amounts considered and treated in the said report and statement to be distributive income of the claimant from the said partnership.

The verification of this claim by the undersigned agent is authorized by the claimant's power of attorney made August 31, 1946, and filed thereafter in the office of the internal revenue agent in charge at San Francisco, California, a signed and verified copy of which power is attached hereto.

MARY E. FRENCH,

By /s/ FRANK C. SCOTT,
Her Attorney-in-Fact.

Subscribed and sworn to before me this 28th day of December, 1948.

[Seal] /s/ MARGARET E. JARDINE,
Notary Public.

Duly verified.

[Endorsed]: Filed December 9, 1949.

[Title of District Court and Cause.]

No. 6257

ANSWER

The defendant, James G. Smyth, Collector of Internal Revenue for the First Collection District of California, by his attorney, Frank J. Hennessy, United States Attorney for the Northern District of California, for answer to the complaint herein states:

I.

Admits the allegations contained in paragraph I of the complaint.

II.

Denies the allegations contained in paragraph II of the complaint, except that defendant admits that plaintiff was a citizen of the United States of America and a resident of the City of Stockton, County of San Joaquin, State of California, and within the Northern District of California; that at all times material to this proceeding he was married and his wife's name is Mary E. French; and that plaintiff and his wife each filed a separate federal income tax return for the year 1943.

III.

Denies the allegations contained in paragraph III of the complaint, except that defendant admits that at all times during the period from November 15, 1938, to May 31, 1943, Oranges Brothers Construction Department was a partnership carrying on a general contracting business at Stockton, Califor-

nia; that plaintiff in filing his income tax return for the year 1943 computed his income tax on two payments received in that year from the said Oranges Brothers Construction Department in accordance with the provisions of Section 107(a) of the Internal Revenue Code; and that the Commissioner of Internal Revenue, after investigation and audit of plaintiff's income tax return for the year 1943, determined a deficiency of $32,718.59, representing income tax in the amount of $28,143.10 and interest thereon in the amount of $4,575.49, which amounts were paid by plaintiff to the defendant as follows:

$27,779.18 on November 25, 1946;
$4,939.41 on June 5, 1947.

IV.

For answer to the allegations contained in paragraph IV of the complaint, defendant admits that on December 29, 1948, plaintiff filed a claim for refund of the sum of $32,718.59 assessed as a deficiency in income tax and interest against plaintiff by the Commissioner of Internal Revenue with respect to the taxable year 1943, but defendant denies that said deficiency in income tax and interest was illegally assessed by the Commissioner and/or illegally collected by the defendant. Further answering the allegations contained in paragraph IV of the complaint, defendant admits that Exhibit A annexed thereto is a true copy of plaintiff's claim for refund referred to therein, but defendant denies each and every allegation of fact contained in said

claim for refund not hereinbefore specifically admitted or denied; and defendant admits that said claim for refund was disallowed by the Commissioner of Internal Revenue under date of November 7, 1949.

V.

Denies each and every allegation contained in paragraph V of the complaint.

VI.

Denies each and every allegation contained in the complaint not hereinbefore specifically admitted or denied.

Wherefore, the defendant prays that the complaint herein be dismissed and that the defendant be given judgment in his favor and against the plaintiff, together with costs and disbursements of this action.

/s/ FRANK J. HENNESSY,
United States Attorney.

[Endorsed]: Filed June 16, 1950.

[Title of District Court and Cause.]

No. 6258

ANSWER

The defendant, James G. Smyth, Collector of Internal Revenue for the First Collection District of California, by his attorney, Frank J. Hennessy, United States Attorney for the Northern District of California, for answer to the complaint herein states:

I.

Admits the allegations contained in paragraph I of the complaint.

II.

Denies the allegations contained in paragraph II of the complaint, except that defendant admits that plaintiff is a citizen of the United States of America and a resident of the City of Stockton, County of San Joaquin, State of California, and within the Northern District of California; that at all times material to this proceeding she was married and her husband's name is George French, Jr.; and that plaintiff and her husband each filed a separate federal income tax return for the year 1943.

III.

Denies the allegations contained in paragraph III of the complaint, except that defendant admits that at all times during the period from November 15, 1938, to May 31, 1943, Oranges Brothers Construction Department was a partnership carrying on a

general contracting business at Stockton, California; that plaintiff in filing her federal income tax return for the year 1943 computed her income tax on two payments received by her in 1943 from said Oranges Brothers Construction Department in accordance with the provisions of Section 107(a) of the Internal Revenue Code; that after investigation and audit of her income tax return for the year 1943, the Commissioner of Internal Revenue determined and assessed a deficiency of $32,717.65, representing an income tax deficiency for the year 1943 in the amount of $28,142.33 and interest thereon in the amount of $4,575.32, which amounts were paid by plaintiff to the defendant as follows:

$27,779.18 on November 25, 1946;
$4,938.48 on June 5, 1947.

IV.

For answer to the allegations contained in paragraph IV of the complaint, defendant admits that on December 28, 1949, plaintiff filed a claim for refund of $32,717.65, representing the amount paid to the defendant on account of the deficiency in income tax for the year 1943 in the amount of $27,779.18 and interest thereon in the amount of $4,938.48, but defendant denies that said deficiency in income tax and interest thereon were illegally assessed by the Commissioner of Internal Revenue and/or illegally collected by the defendant from plaintiff. Further answering the allegations contained in paragraph IV of the complaint, defendant admits that Exhibit A annexed thereto is a true

copy of the claim for refund referred to therein, but defendant denies each and every allegation of fact contained in said claim for refund not hereinbefore specifically admitted or denied, and defendant admits that on November 7, 1949, the Commissioner of Internal Revenue disallowed said claim for refund.

V.

Denies each and every allegation contained in paragraph V of the complaint.

VI.

Denies each and every allegation contained in the complaint not hereinbefore specifically admitted or denied.

Wherefore, the defendant prays that the complaint herein be dismissed and that the defendant be given judgment in his favor and against the plaintiff, together with costs and disbursements of this action.

/s/ FRANK J. HENNESSY,
United States Attorney.

[Endorsed]: Filed June 16, 1950.

In the United States District Court for the Northern District of California, Northern Division

Nos. 6257 and 6258—(Consolidated)

GEORGE FRENCH, JR.,

Plaintiff,

vs.

JAMES G. SMYTH, Collector of Internal Revenue,

Defendant.

MARY E. FRENCH,

Plaintiff,

vs.

JAMES G. SMYTH, Collector of Internal Revenue,

Defendant.

JUDGMENT ON SPECIAL VERDICT

The above causes came on regularly for trial on the 20th day of September, 1950, before the Honorable Dal M. Lemmon and a jury duly impaneled and sworn, Clyde M. Sherwood, Esq., appearing as counsel for plaintiffs and Frank J. Hennessy, Esq., United States Attorney for the Northern District of California, and C. Elmer Collett, Assistant United States Attorney, appearing as counsel for defendant, and evidence both oral and documentary having been adduced and exhibits admitted, and the evidence being closed, the Court, under Rule 49 of the Federal Rules of Civil Procedure, determined

that the jury should be required to return only a special verdict in the form of a special written finding upon each issue of fact. Counsel for plaintiffs and defendant thereupon stipulated that the special verdict be returned in the form of answers to written interrogatories as hereinafter set forth in haec verba. Said cause, after argument by respective counsel, and instructions of the Court having been submitted to the jury for its consideration and special verdict, and the jury on the 21st day of September, 1950, having returned into court and having submitted its special verdict which was read by the Clerk and is as follows, to wit:

"Special Verdict

"During the period November 16, 1938, to May 31, 1943, was George French, Jr., a partner in the partnership of Oranges Bros. Construction Department or was he an employee of that partnership?

"Answer: Partner.

"Was eighty (80%) per cent of his compensation for the period November 16, 1938, to May 31, 1943, received or accrued during the year 1943?

"Answer: Yes.

"ARTHUR W. COLLINS,
"Foreman."

And the Court having found as a conclusion of law that upon the special verdict plaintiffs are entitled to take nothing by their complaint herein and that judgment should be entered in favor of the defendant in each of said consolidated cases;

Now, therefore, by virtue of the law and by rea-

son of the premises as aforesaid, It Is Ordered, Adjudged and Decreed that plaintiffs recover nothing from defendant and that defendant have its costs of suit which are taxed at $.....

Dated: October 4th, 1950.

/s/ DAL M. LEMMON,
United States District Judge.

Approved as to Form:

/s/ CLYDE C. SHERWOOD,

/s/ JOHN V. LEWIS,
Attorneys for Plaintiffs.

[Endorsed]: Filed October 4, 1950.
Entered October 5, 1950.

[Title of District Court and Causes.]

Civil Nos. 6257 and 6258

NOTICE OF MOTION FOR A NEW TRIAL

To Frank J. Hennessy, United States Attorney, and C. Elmer Collett, Assistant United States Attorney, attorneys for defendant:

Please take notice that in the Courtroom of the Honorable Dal M. Lemmon, in the Post Office Building, Sacramento, California, at ten o'clock a.m., on Monday, the 16th day of October, 1950, or as soon thereafter as counsel can be heard, plaintiffs, through their undersigned attorneys, will move the Court to set aside the special verdict of the jury

returned on the 21st day of September, 1950, and the judgment entered thereon on October 5, 1950, and to grant plaintiffs a new trial on the following grounds:

1. The verdict was contrary to law. George French, Jr., was not a partner in Oranges Bros. Construction Department as a matter of law.

2. The two special findings of the special verdict are inconsistent and do not support the judgment.

3. The evidence was insufficient to justify the verdict in that there was no substantial evidence to show that George French, Jr., was a partner in Oranges Bros. Construction Department;

(a) The evidence shows without contradiction that George French, Jr., did not participate in the control or management of Oranges Bros. Construction Department.

(b) The evidence shows without contradiction that George French, Jr., was not a co-owner of Oranges Bros. Construction Department and had no authority to make contracts on its behalf or obligate it.

(c) The evidence shows conclusively that George French, Jr., was not obligated to share in Oranges Bros. Construction Department losses, except as such losses might diminish the profits.

(d) There was no substantial evidence from which the jury could have found that George French, Jr., and the Oranges Brothers intended to create a partnership relationship or intended to carry on business as partners.

(e) In the absence of some evidence to the contrary, it must be presumed that the applications for a contractor's license and the income tax and social security returns of Oranges Bros. Construction Department were legally and properly prepared and filed.

This motion is based upon the pleadings, the oral and documentary evidence introduced at the trial, and all of the records and proceedings in these actions.

Dated: San Francisco, California, October 9, 1950.

SHERWOOD & LEWIS,

By /s/ CLYDE C. SHERWOOD,
Attorneys for Plaintiffs.

Service of copy acknowledged.

[Endorsed]: Filed October 10, 1950.

[Title of District Court and Cause.]

Nos. 6257 and 6258

ORDER

Plaintiffs' motion for a new trial is granted.

Dated: November 22nd, 1950.

/s/ DAL M. LEMMON,
United States District Judge.

[Endorsed]: Filed November 22, 1950.

[Title of District Court and Causes.]

Nos. 6257 and 6258

MOTION FOR LEAVE TO FILE AMENDED COMPLAINT AND TO JOIN HAROLD A. BERLINER AS A PARTY DEFENDANT

To Frank J. Hennessy, United States Attorney, and Macklin Fleming, Assistant United States Attorney, Attorneys for Defendant James G. Smyth:

Please Take Notice that in the Courtroom of the Honorable Dal M. Lemmon in the Post Office Building, Sacramento, California, at 10:00 o'clock a.m. on Monday, the 5th day of February, 1951, or as soon thereafter as counsel can be heard, plaintiff, through his undersigned attorneys, will move the Court for leave to file an amended complaint in the above-entitled action, and for an order joining Harold A. Berliner (former Collector of Internal Revenue) as a party defendant. A copy of the proposed amended complaint is attached hereto and made a part hereof.

Said motions will be based upon:

A. The said proposed amended complaint;

B. The affidavit of Frank C. Scott attached hereto;

C. Plaintiff's memorandum of points and authorities attached hereto; and

D. All of the pleadings, files and records in this proceeding.

Dated: San Francisco, California, January 25th, 1951.

SHERWOOD & LEWIS,

By /s/ CLYDE C. SHERWOOD,
Attorneys for Plaintiff.

Service and receipt of copy acknowledged.

[Title of District Court and Causes.]

Nos. 6257 and 6258

AFFIDAVIT OF FRANK C. SCOTT IN SUPPORT OF PLAINTIFF'S MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT

State of California,
County of San Joaquin—ss.

Frank C. Scott, being first duly sworn, deposes and says:

That he is a Certified Public Accountant duly licensed to practice as such in the State of California. That in the year 1944 he had his principal office for the practice of his profession in the City of Stockton, County of San Joaquin, State of California. That in the course of his duties as a professional tax consultant and advisor affiant prepared George French, Jr.'s, income tax and victory tax return for the calendar year 1943. That affiant computed the tax on the income that George French, Jr., received from Orange Brothers Construction

Department in the year 1943 in accordance with the provisions of Sec. 107(a) of the Internal Revenue Code. That at the time the said income and victory tax return was prepared the Bureau of Internal Revenue had ruled (Reg. Sec. 36.6(b) T.D. 5300; 1943 CB 43) that taxpayers taking advantage of the relief provisions of Section 107(a) I.R.C. were not entitled to the benefits of Section 6 of the Current Tax Payment Act. In other words, the position of the Bureau of Internal Revenue at that time was that the taxpayer was not entitled to claim forgiveness of 75% of the tax on the income allocated to the year 1942 under the provisions of Section 107(a). That the sole reason why such forgiveness was not claimed in Schedule M of the said 1943 return was the said regulation of the Bureau of Internal Revenue. That affiant also prepared George French, Jr.'s claim for refund, a copy of which is attached to the original complaint on file herein. That the said refund claim fully apprised the Commissioner of Internal Revenue of all relevant facts and of the taxpayer's contention that he was entitled to have his 1943 income allocated in accordance with the provisions of 107(a) I.R.C. That the taxpayer's said 1943 income and victory tax return and the said refund claim contain all of the information necessary for the correct computation of the taxpayer's correct income and victory tax liability for the year 1943. The application of Section 107(a) is a mere matter of mathematical computation, to wit, reducing the income attributable to the year

1942 as shown on taxpayer's 1943 return and on said refund claim by 75%.

/s/ FRANK C. SCOTT.

Subscribed and sworn to before me this 25th day of January, 1951.

[Seal] /s/ MARGARET E. JARDINE,
Notary Public in and for the County of San Joaquin, State of California.

[Endorsed]: Filed January 30, 1951.

[Title of District Court and Causes.]

Nos. 6257 and 6258

ORDER

Plaintiffs' motions for leave to file amended complaint in each of the above actions are granted without prejudice to defendant's right at the trial to raise the question as to whether the claim as filed supports the recovery sought by the amended complaint over that sought by the original complaint.

The motions in each action to join Harold A. Berliner as a party defendant are granted.

Defendant's motions in each action to reconsider order granting a new trial and to reinstate verdict are denied.

Dated: December 13th, 1951.

/s/ DAL M. LEMMON,
United States District Judge.

[Endorsed]: Filed December 13, 1951.

[Title of District Court and Cause.]

No. 6257

AMENDED COMPLAINT FOR REFUND OF INCOME TAXES ILLEGALLY COLLECTED

Now comes the above-named plaintiff and complains of the above-named defendants and for cause of action alleges as follows:

I.

That defendant, James G. Smyth, is a resident of the City and County of San Francisco, State of California; that defendant James G. Smyth is now and at all times subsequent to the 14th day of May, 1945, has been the duly appointed, qualified and acting Collector of Internal Revenue for the First Collection District of California; that defendant Harold A. Berliner is a resident of the City and County of San Francisco, State of California; that defendant Harold A. Berliner was at all times relevant herein prior to April 1, 1945, the duly appointed, qualified and acting Collector of Internal Revenue for the First Collection District of California; that the Court has jurisdiction over this matter under the provisions of Title 28, Sec. 1340, United States Code.

II.

That said plaintiff is now and at all times herein mentioned, has been a citizen of the United States of America, and a resident of the City of Stockton,

County of San Joaquin, State of California, and within the said Northern District of California. That at all times material to this proceeding, plaintiff was married and his wife's name is Mary E. French. That during all such times all income received by plaintiff was community income and was reported by plaintiff and his said wife on a community basis, each filing a separate income tax return for the year 1943, and all prior years herein mentioned. That within the time allowed by law therefor, plaintiff and his said wife have caused to be prepared, executed and filed with said defendant, their respective income tax returns for the year 1943; that at all times herein mentioned plaintiff kept his books of account and filed his income tax returns on the calendar year basis and on the cash basis of accounting.

III.

That at all times during the period from November 15, 1938, to May 31, 1943, Oranges Brothers Construction Department was a partnership carrying on a general contracting business at Stockton, California; that at all said times plaintiff was employed as superintendent of construction by said Oranges Brothers Construction Department. That such employment was on a fixed salary and commission basis under an agreement of employment whereby plaintiff was to receive a fixed salary of $150.00 per month, and also was entitled to receive one-half (½) of the net profits of said construction and contracting business. That plaintiff received for his personal services, under said contract of employment, a total com-

pensation of $429,196.69, of which 4.85 per cent, or $20,827.87, was received prior to January 1, 1943, and 95.15 per cent, or $408,368.82, was received during the taxable year 1943, to wit:

The sum of $75,062.50 on February 8, 1943; and $333,306.32 after May 31, 1943.

That plaintiff in filing his income tax returns for the year 1943 attempted to compute his tax on said two payments received in 1943 in accordance with the provisions of Internal Revenue Code, Sec. 107 (a), allocating each payment over the period of service preceding the receipt of such payment, which comprised 51 and 55 months, respectively. That said income and victory tax return erroneously reported a total income and victory tax liability for the taxable year of 1943 in the sum of $69,150.12. That in making such computation plaintiff inadvertently and mistakenly omitted to claim forgiveness of 75% of his 1942 income tax liability in accordance with Sec. 6 of the Current Tax Payment Act. That plaintiff's correct total income and victory tax liability for the taxable year of 1943 on all incomes received from his employment by Oranges Brothers Construction Department and from other sources amounted to $49,538.92. That plaintiff paid to Harold A. Berliner, who was then Collector of Internal Revenue for the First Collection District of California, with his principal office at San Francisco, California, the tax of $69,150.12 shown on his said income tax return as follows:

July 15, 1943, paid on 1942 return	$29,451.94
September 15, 1943, paid on 1943 declaration of estimated tax	26,219.78
December 15, 1943, paid on amended 1943 declaration of estimated tax	13,701.94
1943 payment by employer of amount withheld from compensation	11,521.56
Total	$80,895.22
Less overpayment refunded	11,745.10
Net liability per the 1943 return	$69,150.12

That the Commissioner of Internal Revenue erroneously assessed a total income and victory tax liability for the said year 1943 in the amount of $97,293.22 and erroneously assessed a deficiency of $32,718.59 consisting of taxes in the amount of $28,-143.10 and interest in the amount of $4,575.49. That said erroneously assessed deficiency in the amount of $32,718.59 was paid in full by the plaintiff to the defendant James G. Smyth, who was then Collector of Internal Revenue for the First Collection District of California, on the following dates, to wit:

$27,779.18 on November 26, 1946; and
$4,939.41 on June 5, 1947.

IV.

That on the 28th day of December, 1948, and within the time allowed under the provisions of I.R.C. Sec. 322 (b) (3), plaintiff caused to be prepared, executed and filed a claim for the refund of the taxes and interest illegally assessed by the Commissioner of Internal Revenue and illegally and

erroneously collected by the defendant on the dates above set forth. That a copy of said refund claim, marked "Exhibit A," is annexed to the original complaint on file herein and is incorporated hereto with the same force and effect as if here set forth in haec verba. That said refund claim was disallowed by the Commissioner of Internal Revenue by notice dated November 7, 1949, under Symbol No. IT:CL:CC:Rej.

V.

That plaintiff has overpaid his income and victory tax for the year 1943 by the amount of $52,329.79. That no part of said sum ever was or is legally owing or paid to the said defendant as and for an income tax of plaintiff for the calendar year 1943 or for any period, or otherwise, or at all. That no part of said sum has been repaid or scheduled for refund to plaintiff and the whole thereof, together with interest thereon from the time it was paid to the defendant, is now due, owing and unpaid from defendant unto plaintiff.

Wherefore, Plaintiff prays for judgment in his favor and against the defendant Harold A. Berliner in the sum of $19,611.20, together with interest on said sum from the respective dates upon which it was paid to the said defendant pursuant to the provisions of I.R.C. Sec. 3771, and plaintiff prays for judgment in his favor and against the defendant James G. Smyth in the sum of $32,718.59, together with interest on said sum from the respective dates of payments pursuant to the provisions of I.R.C.

Sec. 3771, and for such other and further relief as the Court may find meet and just in the premises.

/s/ CLYDE C. SHERWOOD,

/s/ JOHN V. LEWIS,

Attorneys for Plaintiff.

Duly verified.

[Endorsed]: Filed December 20, 1951.

[Title of District Court and Cause.]

AMENDED COMPLAINT FOR REFUND OF INCOME TAXES ILLEGALLY COLLECTED

Now comes the above-named plaintiff and complains of the above-named defendants and for cause of action alleges as follows:

I.

That defendant James G. Smyth is a resident of the City and County of San Francisco, State of California; that defendant James G. Smyth is now and at all times subsequent to the 14th day of May, 1945, has been the duly appointed, qualified and acting Collector of Internal Revenue for the First Collection District of California; that defendant Harold A. Berliner is a resident of the City and County of San Francisco, State of California; that defendant Harold A. Berliner was at all times relevant herein

prior to April 1, 1945, the duly appointed, qualified and acting Collector of Internal Revenue for the First Collection District of California; that the Court has jurisdiction over this matter under the provisions of Title 28, Sec. 1340, United States Code.

II.

That said plaintiff is now, and at all times herein mentioned has been, a citizen of the United States of America and a resident of the City of Stockton, County of San Joaquin, State of California, and within the said Northern District of California. That at all times material to this proceeding, plaintiff was married, and her husband's name is George French, Jr.; that during all such times all income of plaintiff was derived from community income which was reported by plaintiff and her husband on a community basis, each filing a separate income tax return for the year 1943, and all prior years herein mentioned. That within the time allowed by law therefor plaintiff and her said husband have caused to be prepared, executed and filed with said defendant their respective income tax returns for the year 1943; that at all times herein mentioned plaintiff kept her books of account and filed her income tax returns on the calendar year basis and on the cash basis of accounting.

III.

That at all times during the period from November 15, 1938, to May 31, 1943, Oranges Brothers Construction Department was a partnership carrying

on a general contracting business at Stockton, California; that at all times plaintiff's husband was employed as superintendent of construction by said Oranges Brothers Construction Department. That such employment was on a fixed salary and commission basis under an agreement of employment whereby plaintiff's husband was to receive a fixed salary of $150.00 per month, and also was entitled to receive one-half of the net profits of said construction and contracting business. That plaintiff's husband received for his personal services under said contract of employment a total compensation of $429,196.69, of which 4.85 per cent, or $20,827.87, was received prior to January, 1943, and 95.15 per cent, or $408,368.82, was received during the taxable year 1943, to wit:

> The sum of $75,062.50 on February 8, 1943; and $333,306.32 after May 31, 1943.

That plaintiff in filing her income tax return for the year 1943 attempted to compute her tax on her community share of said two payments received in 1943 in accordance with the provisions of Internal Revenue Code Section 107(a), allocating each payment over the period and services preceding the receipt of such payment by her husband, which comprised 51 and 55 months, respectively. That said income and victory tax return erroneously reported a total income and victory tax liability for the taxable year of 1943 in the sum of $69,149.54. That in making such computation plaintiff inadvertently and mistakenly omitted

to claim forgiveness of 75% of her 1942 income tax liability in accordance with Sec. 6 of the Current Tax Payment Act. That plaintiff's correct total income and victory tax liability for the taxable year of 1943 on all incomes received from her husband's employment by Oranges Brothers Construction Department and from other sources amounted to $49,538.33. That plaintiff paid to Harold A. Berliner, who was then Collector of Internal Revenue for the First Collection District of California with his principal office at San Francisco, California, the tax of $69,149.54 shown on her said income tax return as follows:

July 15, 1943, paid on 1942 return	$29,569.95
September 15, 1943, paid on 1943 declaration of estimated tax	26,160.78
December 15, 1943, paid on amended 1943 declaration of estimated tax	13,406.13
1943 payment by husband's employer of amount withheld from compensation	11,521.56
Total	$80,658.42
Less overpayment refunded	11,508.88
Net liability per the 1943 return	$69,149.54

That the Commissioner of Internal Revenue erroneously assessed a total income and victory tax liability for the said year 1943 in the amount of $97,291.87 and erroneously assessed a deficiency of $32,717.65 consisting of taxes in the amount of $28,-

142.33 and interest in the amount of $4,575.32. That said erroneously assessed deficiency in the amount of $32,717.65 was paid in full by the plaintiff to the defendant James G. Smyth, who was then Collector of Internal Revenue for the First Collection District of California on the following dates, to wit:

$27,779.18 on November 26, 1946; and
$4,938.47 on June 5, 1947.

IV.

That on the 28th day of December, 1948, and within the time allowed under the provisions of I.R.C. Sec. 322(b)(3), plaintiff caused to be prepared, executed and filed a claim for the refund of the taxes and interest illegally assessed by the Commissioner of Internal Revenue and illegally and erroneously collected by the defendant on the dates above set forth. That a copy of said refund claim, marked "Exhibit A," is annexed to the original complaint on file herein and is incorporated hereto with the same force and effect as if here set forth in haec verba. That said refund claim was disallowed by the Commissioner of Internal Revenue by notice dated November 7, 1949, under Symbol No. IT:CL:CC:Rej.

V.

That plaintiff has overpaid her income and victory tax for the year 1943 by the amount of $52,328.86. That no part of said sum ever was or is legally owing or paid to the said defendant as and for an income tax of plaintiff for the calendar year 1943 or for any period, or otherwise, or at all. That

no part of said sum has been repaid or scheduled for refund to plaintiff and the whole thereof, together with interest thereon from the time it was paid to the defendant, is now due, owing and unpaid from defendant unto plaintiff.

Wherefore, plaintiff prays for judgment in her favor and against the defendant Harold A. Berliner in the sum of $19,611.21 together with interest on said sum from the respective dates upon which it was paid to the said defendant pursuant to the provisions of I.R.C. Sec. 3771, and plaintiff prays for judgment in her favor and against the defendant James G. Smyth in the sum of $32,717.65 together with interest on said sum from the respective dates of payments, pursuant to the provisions of I.R.C. Sec. 3771, and for such other and further relief as the Court may find meet and just in the premises.

/s/ CLYDE C. SHERWOOD,

/s/ JOHN V. LEWIS,

Attorneys for Plaintiff.

Duly verified.

[Endorsed]: Filed December 20, 1951.

[Title of District Court and Cause.]

No. 6257

ANSWER TO AMENDED COMPLAINT

The defendants, James G. Smyth, Collector of Internal Revenue for the First Collection District

of California, and Harold A. Berliner, former Collector of Internal Revenue for said Collection District of California, by their Attorney Chauncey Tramutolo, United States Attorney for the Northern District of California, for answer to the amended complaints herein make the following statements:

I.

Admit the allegations contained in paragraph I of said amended complaint, except that defendants deny that this court has jurisdiction over the matters contained in said amended complaint under the Provisions of Title 28, Section 1340, U. S. Code.

II.

Deny the allegations contained in paragraph II of said amended complaint, except that defendants admit that plaintiff was a citizen of the United States and a resident of the City of Stockton, County of San Joaquin, State of California, and within the Northern District of California; that at all times material to this proceeding he was married and his wife's name was Mary E. French, and that plaintiff and his wife each filed a separate federal income tax return for the calendar year 1943.

III.

Deny the allegations contained in paragraph III of said amended complaint, except that defendants admit that all times during the period from November 15, 1938, to May 31, 1943, Oranges Brothers Construction Department was a partnership carry-

ing on a general contracting business at Stockton, California; that at all said times plaintiff was superintendent of construction of said Oranges Brothers Construction Department, and was entitled to receive one-half of the net profits of said construction and contracting business; that plaintiff computed his income tax for the calendar year 1943 on his federal income tax return for that year in accordance with the Provisions of Section 107 (a) of the Internal Revenue Code, but defendants deny that plaintiff was entitled to compute his federal income tax for that year under that Section of the Internal Revenue Code.

Further answering the allegations contained in paragraph III of said amended complaint, defendants admit that plaintiff paid to Harold A. Berliner, when he was former collector of Internal Revenue for the First Collection District of California, the net tax of $69,150.12 on the dates and in the amounts as shown on lines 22 to 28 on page 3 of said amended complaint.

IV.

Deny the allegations contained in paragraph IV of said amended complaint, except that defendants admit that exhibit "A" annexed to plaintiff's original complaint in this action is a true copy of a claim for refund filed by him with the Collector of Internal Revenue for the First Collection District of California on December 28, 1948, and that by registered notice dispatched to plaintiff on November 7, 1949, he was notified that said claim for re-

fund had been disallowed in its entirety by the Commissioner of Internal Revenue, but defendants deny each and every allegation contained in said claim for refund not herein specifically admitted or denied.

V.

Deny each and every allegation contained in paragraph V of said amended complaint.

Wherefore defendants pray that the said amended complaint herein be dismissed and that defendants be given judgment in their favor and against the plaintiff, together with costs and disbursements of this action.

/s/ CHAUNCEY TRAMUTOLO,
United States Attorney.

/s/ THOMAS W. MARTIN,
Assistant U. S. Attorney.

[Endorsed]: Filed February 21, 1952.

[Title of District Court and Cause.]

No. 6258

ANSWER TO AMENDED COMPLAINT

The defendants, James G. Smyth, Collector of Internal Revenue for the First Collection District of Northern California, and Harold A. Berliner, former Collector of Internal Revenue for said collection district, by their attorney, Chauncey Tramutolo, United States Attorney for the Northern Dis-

trict of California, for answer to the amended complaints herein make the following statements:

I.

Admit the allegations contained in paragraph I of said amended complaint, except that defendants deny that this court has jurisdiction over the matters contained in this amended complaint under the Provisions of Title 28, Section 1340, U. S. Code.

II.

Deny the allegations contained in paragraph II of said amended complaint, except that defendants admit that plaintiff is a citizen of the United States of America and a resident of the City of Stockton, County of San Joaquin, State of California, and within the Northern District of California; that at all times material to this proceeding she was married and her husband's name is George French, Jr., and that plaintiff and her husband each filed separate federal income tax returns for the calendar year 1943.

III.

Deny the allegations contained in paragraph III of said amended complaint, except that defendants admit that at all times during the period from November 15, 1938, to May 31, 1943, Oranges Brothers Construction Department was a partnership carrying on a general contracting business at Stockton, California, and at all said times plaintiff's husband was superintendent of construction of said Oranges Brothers Construction Department; that he was

entitled to receive one-half of the net profits of the said construction and contracting business; that plaintiff computed her federal income tax for the calendar year 1943 on the community basis and in accordance with the Provisions of Section 107 (a) of the Internal Revenue Code, but the defendants deny that plaintiff was entitled to compute her federal income tax under that section of the Internal Revenue Code. Further answering the allegations contained in paragraph III of said complaint, defendants admit that plaintiff paid to Harold A. Berliner, when he was former Collector of Internal Revenue for the First Collection District of California, the net tax of $69,149.54 on the dates and in the amounts as shown on lines 24 to 30 on page 3 of said amended complaint.

IV.

Deny the allegations contained in paragraph IV of said amended complaint, except that defendants admit that exhibit "A" annexed to plaintiff's original complaint in this action is a true copy of a claim for refund filed by plaintiff with the Collector of Internal Revenue for the First Collection District of California on December 28, 1948, and that by registered notice dispatched to plaintiff on November 7, 1949, she was notified that said claim for refund had been disallowed in its entirety by the Commissioner of Internal Revenue, but defendants deny each and every allegation contained in said claim for refund not herein specifically admitted or denied.

V.

Deny each and every allegation contained in paragraph 5 of said amended complaint.

Wherefore defendants pray that the amended complaint herein be dismissed and that they be given judgment in their favor and against the plaintiff, together with the costs and disbursements of this action.

/s/ CHAUNCEY TRAMUTOLO,
United States Attorney.

/s/ THOMAS W. MARTIN,
Assistant U. S. Attorney.

[Endorsed]: Filed February 21, 1952.

[Title of District Court and Causes.]

Nos. 6257 and 6258

STIPULATION

It Is Hereby Stipulated by and between the parties hereto, through their respective counsel of record as follows:

1. That all of the files, pleadings, motions and supporting papers in the above-entitled actions, and all of the evidence, oral and documentary introduced at the trial of said actions on September 20th and 21st, 1950, and stipulations of counsel appearing in the transcripts of said trials, together with the documents hereinafter enumerated, true copies of which are attached hereto and made a part

hereof, shall constitute the entire evidence and record upon which the above-entitled actions are submitted for decision:

a. Oranges Brothers Construction Department Summary of Gross Income November 15, 1938, to May 31, 1943, marked Defendants' Exhibit "E";

b. Original partnership return, Oranges Brothers Construction Department for the calendar year 1942, marked Defendants' Exhibit "F";

c. Amended partnership return, Oranges Brothers Construction Department for the calendar year 1942 marked Defendants' Exhibit "G";

d. Partnership return, Oranges Brothers Construction Department for the calendar year 1943 marked Defendants' Exhibit "H";

e. Original individual income tax return of George French, Jr., for the calendar year 1942, marked Defendants' Exhibit "I";

f. Amended individual income tax return of George French, Jr., for the calendar year 1942, marked Defendants' Exhibit "J";

g. Original individual income tax return of Mary E. French for the calendar year 1942 marked defendants' Exhibit "K";

h. Amended individual income tax return of Mary E. French for the calendar year 1942 marked Defendants' Exhibit "L";

2. That the Reporter's Transcript, Volumes 1 and 2, included in the record under paragraph 1 above, is subject to correction for a number of typographical errors; that an agreed list of such errors will be forwarded to the Court Reporter, to be appended to the official Transcript on file in the above-entitled actions.

3. That defendants, and each of them, are residents of the City and County of San Francisco, State of California; that defendant James G. Smyth was, at all times from May 15, 1945, to and including the date of this action, the duly appointed, qualified and acting Collector of Internal Revenue for the First Collection District of California; that defendant Harold A. Berliner was, at all times material herein prior to April 1st, 1945, the duly appointed, qualified and acting Collector of Internal Revenue for the First Collection District of California.

4. That at all times during the years 1938 through 1943, inclusive, plaintiffs were married, and all income received during such period by George French, Jr., was the community income of plaintiffs, and was properly reportable upon a community basis.

5. That in the event the Court shall find for the plaintiff George French, Jr., according to his amended complaint, judgment shall be entered against defendant Harold Berliner for $19,726.79 with interest from March 15, 1944, and judgment shall be entered against defendant James G. Smyth

for $32,718.59, with interest on $27,779.18 from November 26, 1946, and with interest on $4,939.41 from June 5, 1947. In the alternative event, that the Court shall find for the plaintiff George French, Jr., according to the allegations of the original complaint against the defendant James G. Smyth only, judgment shall be entered against defendant James G. Smyth in the amount and manner shown above.

6. That in the event the Court shall find for the plaintiff, Mary E. French according to her amended complaint, judgment shall be entered against defendant Harold A. Berliner for $19,490.80, with interest from March 15, 1944, and judgment shall be entered against defendant James G. Smyth for $32,717.65 with interest on $27,779.18 from November 26, 1946, and with interest on $4,938.47 from June 5, 1947. In the alternative event that the Court shall find for the plaintiff Mary E. French according to the allegations of the original complaint against the defendant James G. Smyth only, judgment shall be entered against defendant James G. Smyth for $32,578.28 with interest on $27,639.81 from November 26, 1946, and with interest on $4,938.47 from June 5, 1947.

7. That plaintiffs herein, respectively, made the following payments and total net payments to Harold A. Berliner, as Collector of Internal Revenue for the First Collection District of California, upon the dates, and in the amounts hereinafter indicated:

George French, Jr.

Date of Payment	Amount
7-15-43	$29,451.94
9-15-43	26,219.78
12-15-43	13,701.94
1943 payment by employer of amount withheld from compensation	11,521.56
Total	$80,895.22
Less: overpayment refunded	11,745.10
Total net payment equal to net liability per 1943 return	$69,150.12

Mary French

Date of Payment	Amount
7-15-43	$29,569.95
9-15-43	26,160.78
12-15-43	13,406.13
1943 payment by husband's employer of amount withheld from compensation	11,521.56
Total	$80,658.42
Less: overpayment refunded	11,508.88
Total net payment equal to net liability per 1943 return	$69,149.54

No part of said total net payments has been refunded or scheduled for refund to plaintiffs, or either of them.

8. That plaintiffs made, respectively, the following payments on account of an asserted deficiency of income tax and interest to James G. Smyth as Collector of Internal Revenue for the

First Collection District of California, on the dates and in the amounts indicated below:

Date of Payment	George French, Jr.	Mary French
November 26, 1946 ...	$27,779.18	$27,779.18
June 5, 1947	4,939.41	4,938.47
Total payment	$32,718.59	$32,717.65

No part of said total payments has been refunded or scheduled for refund to plaintiffs, or either of them.

9. That George French, Jr., was Superintendent of Construction of Oranges Brothers Construction Department from November 15, 1938, to May 31, 1943.

11. That in the event judgment is rendered against the defendants, or either of them, such judgment shall include a certificate that there was probable and reasonable cause for the acts of defendants, or either of them, in demanding and collecting from plaintiffs, the income taxes for the refund of which, judgment will be entered.

Dated: July 24, 1952.

SHERWOOD & LEWIS,
By /s/ CLYDE C. SHERWOOD,
Attorneys for Plaintiffs.

CHAUNCEY TRAMUTOLO,
United States Attorney.
By /s/ CHARLES ELMER COLLETT,
Attorney for Defendants.

[Endorsed]: Filed July 28, 1952.

[Title of District Court and Causes.]

Nos. 6257 and 6258

MEMORANDUM OPINION

Taxation, our Supreme Court has said, is "a subject that is highly specialized and so complex as to be the despair of judges."[1]

The particular feature of tax law to be here considered is the effect of the taxpayers' failure to assert, before the Collector of Internal Revenue, a ground for refund that they now seek to press before this Court. In their claims for refund, filed with the Collector, the taxpayers neglected to invoke the "forgiveness" feature of the Current Tax Payment Act of 1943.

To err is human, to forgive divine, runs the ancient adage. In the present suit, however, it will be found that because the taxpayers "erred" in their respective refund claims, they cannot be "forgiven" part of their taxes.

1. Statement of the Case.

This cause, on the original complaints, was tried before a jury on September 20 and 21, 1950. The result was a special verdict and a judgment thereon in favor of the defendant Smyth. The plaintiffs' motion for a new trial was granted by this Court on November 22, 1950.

The plaintiffs thereafter filed a motion for leave

---

[1]Dobson v. Commissioner, 320 U.S. 489, 498 (1943).

to file amended complaints and to join as a party defendant Harold A. Berliner, former Collector of Internal Revenue for the First Collection District of California. The defendant Smyth filed a motion for this Court to reconsider its order granting a new trial and to reinstate the jury's verdict. By order entered December 13, 1951, this Court denied the motion of defendant Smyth, and granted the plaintiff's motion for leave to file amended complaints and to join Berliner as a party defendant.

In their brief, the plaintiffs assert that "The purpose of the amended complaints was to secure recovery of overpayments of income taxes for the year 1943 made by plaintiffs to * * * Berliner which overpayments are alleged to be based upon the same ground as the overpayments to defendant * * * Smyth, to wit: the denial to plaintiffs of the relief provided in Section 107(a)."

The amended complaint of the plaintiff George French, Jr., however, contains the following allegations that do not appear in his original complaint:[2]

> "(The) plaintiff in filing his income tax returns for the year 1943 attempted to compute his tax on said two payments (for personal services rendered to the Oranges Bros. Construction Co., Ex. I) received in 1943 in accordance with the provisions of the Internal Revenue Code Sec. 107(a), allocating each payment over the period of service preceding the receipt of such payment which comprised 51 and 55

[2]Mutatis mutandis, the same is true as to the amended complaint of the plaintiff Mary E. French.

months, respectively. That said income and victory tax return erroneously reported a total income and victory tax liability for the taxable year of 1943 in the sum of $69,150.12. That in making such computation plaintiff inadvertently and mistakenly omitted to claim forgiveness of 75 per cent of his 1942 income tax liability in accordance with section 6 of the Current Tax Payment Act. That plaintiff's correct total income and victory tax liability for the taxable year of 1943 on all incomes received from his employment by Oranges Brothers Construction Department and from other sources amounted to $49,538.92. That plaintiff paid to Harold A. Berliner, who was then Collector of Internal Revenue for the First Collection District * * * the tax of $69,-150.12 shown on his said income tax return," etc.

The parties have stipulated that these cases are submitted to the Court without a jury for decision upon the evidence introduced at the trial of the actions on September 20 and 21, 1950, together with certain specified documents.

2. Questions Presented.

The first question presented is whether the plaintiffs are entitled to compute their respective income tax liabilities for the calendar year 1943 in accordance with the relief provisions of Section 107(a) of 26 USCA. At the previous trial of these actions, the defendants contended that the plaintiff George

French, Jr., was a co-partner or a co-adventurer rather than an employee of Oranges Bros. Construction Department. This Court adheres to its previous ruling that French was an employee of the construction company, and that therefore both plaintiffs are entitled to avail themselves of the relief provisions of Section 107(a).

The second question is concerned with whether the plaintiffs are entitled to avail themselves, as against the defendant Berliner, of the "forgiveness" provisions of Section 6 of the Current Tax Payment Act of 1943, 26 USCA, Internal Revenue Acts, pages 406-411. The defendants contend that the plaintiffs are not entitled to a judgment against the defendant Berliner since the claims for refund did not include the liability now asserted against him.

3. The Applicable Statute and Regulations.

The applicable statute relating to suits for tax refunds is 26 USCA section 3772, which reads in part as follows:

> "(a) Limitations
>
> "(1) Claim. No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner,

according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof."

The administrative rules relating to "claims for refund by taxpayers" are to be found in the Code of Federal Regulations, 1943 Cumulative Supplement, Title 26, pages 6443-6444, as amended in 1944 Supplement, id., pages 1989-1990. Section 29.322-3 of that Code provides that "Claims by the taxpayer for the refunding of taxes, interest, penalties, and additions to tax erroneously or illegally collected shall be made on Form 843," and that:

"The claim must set forth in detail and under oath each ground upon which a refund is claimed, and facts sufficient to apprise the Commissioner of the exact basis thereof * * * A claim which does not comply with this paragraph will not be considered for any purpose as a claim for refund." (Emphasis supplied.)

4. The Sole Claims for Refund.

The claims for refund filed by the plaintiffs on December 28, 1948, contained the following allegations, again mutatis mutandis:

"* * * that the assessments of deficiencies on the said return for the calendar year 1943 were, with reference to the report and statement described above and incorporated herein by reference, based on the following errors:

"(1) The disallowance of the application of the provisions of section 107, Internal Revenue Code, in limitation of his income and victory

tax liability on compensation for services received in 1943 for services during and for a period of more than 36 months, as computed in his said return for 1943;

"(2) The computation of his income from services during the years 1942 and 1943 on the theory that, and as if he had been a member of a partnership, Oranges Brothers Construction Division; and

"(3) In the alternative to the assignments of error 1) and 2) above, the failure of the said report and statement (of the internal revenue agents) to allow in the computation of victory tax net income for the year 1943 a deduction for California income taxes on the amounts considered and treated in the said report and statement to be distributive income from the said partnership."

The above constituted the only "assignments of error" contained in the plaintiffs' claims for refund filed with the Collector. There is in those assignments not the slightest intimation, either of fact or of law, that the taxpayer was relying upon the "forgiveness" provisions of Section 6 of the Current Tax Payment Act of 1943.

5. Strict Compliance by the Taxpayer With Refund Statutes and Regulations Is Required.

For nearly a century, the Supreme Court has adhered to the rule that statutes authorizing refunds to taxpayers should be strictly construed in favor of the Government. Both the boundaries and

the rationale of this doctrine were lucidly stated in Nicholl v. United States, 74 U.S. 122, 126-127 (1869):

> "The immunity of the United States from suit is one of the main elements to be considered in determining the merits of this controversy. Every government has an inherent right to protect itself against suits, and if, in the liberality of legislation, they are permitted, it is only on such terms and conditions as are prescribed by statute. The principle is fundamental, applies to every sovereign power, and but for the protection which it affords, the government would be unable to perform the various duties for which it was created. It would be impossible for it to collect revenue for its support, without infinite embarrassments and delays, if it was subject to civil processes the same as a private person.
>
> "It is not important for the purposes of this suit, to notice any of the Acts of Congress on the subject of payment of the duties on imports, anterior to the Act of Feb. 26, 1845, 5 Stat. at L. 727. This Act altered the rule previously in force, and required the party of whom duties were claimed, and who denied the right to claim them, to protest in writing with a specific statement of the grounds of objection.
>
> "Through this law Congress said to the importing merchant, you must pay the duties assessed against you; but as you say they are

illegally assessed, if you file a written protest stating wherein the illegality consists, you can test the question of your liability to pay, in a suit against the collector, to be tried in due course of law and, if the courts decide in your favor, the treasury will repay you; but in no other way will the Government be responsible to refund.

"The written protest, signed by the party, with the definite grounds of objection, were conditions precedent to the right to sue, and if omitted, all right of action was gone. These conditions were necessary for the protection of the Government, as they informed the officers charged with the collection of the revenue from imports, of the merchants' reasons for claiming exemption, and enabled the Treasury Department to judge of their soundness, and to decide on the risk of taking the duties in the face of the objections. There was no hardship in the case, because the law was notice equally to the collector and importer, and was a rule to guide their conduct, in case differences should arise in relation to the laws for the imposition of duties. The allowing a suit at all, was an act of beneficence on the part of the Government. As it had confided to the Secretary of the Treasury the power of deciding in the first instance on the amount of duties demandable on any specific importation, so it could have made him the final arbiter in all disputes concerning the same." (Emphasis supplied.)

Coming down to more recent years, we find the foregoing doctrine explicitly and emphatically applied by the Supreme Court in an income tax case. In United States v. Felt & Tarrant Co., 283 U.S. 269, 270, 272-273 (1931), it was "conceded that respondent was entitled to a deduction from gross income * * *, which, if allowed, would result in the refund demanded." "The sole objection urged by the Government" was "that the claim for refund filed by petitioner as a prerequisite to suit did not comply" with a statute identical in all material respects with Section 3772 (a)(1), supra, and with a Treasury Regulation that was not so exacting as Section 29.322-3, supra.

With such a situation before him, Mr. Justice (later Chief Justice) Stone said:

> "The filing of a claim or demand as a prerequisite to a suit to recover taxes paid is a familiar provision of the revenue laws, compliance with which may be insisted upon by the defendant, whether the collector or the United States. (Cases cited.)
>
> "One object of such requirements is to advise the appropriate officials of the demands or claims intended to be asserted, so as to insure an orderly administration of the revenue, (case cited), a purpose not accomplished with respect to the present demand by the bare declaration in respondent's claim that it was filed 'to protect all possible legal rights of the taxpayer.' The claim for refund, which Section 1318 makes prerequisite to suit, obviously relates to

the claim which may be asserted by the suit. Hence, quite apart from the provisions of the Regulation, the statute is not satisfied by the filing of a paper which gives no notice of the amount or nature of the claim for which the suit is brought, and refers to no facts upon which it may be founded.

"* * * But in Tucker v. Alexander (infra) the right of the Government to insist upon compliance with the statutory requirement was emphasized.* * *

"The necessity for filing a claim such as the statute requires is not dispensed with because the claim may be rejected. It is the rejection which makes the suit necessary. An anticipated rejection of the claim, which the statute contemplates, is not a ground for suspending its operation. Even though formal, the condition upon which the consent to suit is given is defined by the words of the statute, and 'they mark the conditions of the claimant's right.' (Case cited.)" (Emphasis supplied.)

In Maas & Waldstein Co. v. United States, 283 U.S. 583, 588, 589 (1931), the Court said:

"The general purpose of the petitioner's communications to the Commissioner was to induce the latter to set on foot an investigation of the Company's affairs to the end that, after ascertaining the circumstances and in the exercise of a proper discretion, he might make

an assessment duly proportioned to those imposed upon others engaged in like business. There was no challenge of the Commissioner's right then to demand payment according to the general rule—no claim that in view of the facts then before him this would amount to an unlawful imposition.

* * *

"We are unable to conclude that the petitioner's action amounted to a precise objection to an unauthorized exaction within the fair intendment of the statute. Meticulous compliance by the taxpayer with the prescribed conditions must appear before he can recover. (Case cited.)" (Emphasis supplied.)

In Vica Co. v. Commissioner, 9 Cir., 159 F. 2d 148, 150 (1947), certiorari denied, 331 U.S. 833 (1947), the late Senior Judge Garrecht said:

"A necessary part of a proper claim for refund is an adequate statement of the contention of the taxpayer of the extent to which the taxpayer bore the burden of the processing tax, together with a statement of facts in support of that contention."

Again, in Rogan v. Ferry, 9 Cir., 154 F. 2d 974, 976 (1946), our Court of Appeals thus expressed the rule:

"It is of course the law that a suit for refund of taxes must be based on a claim previously filed with the Commissioner, and that the claim

must set forth in detail each ground on which a refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof." (Emphasis supplied.)[3]

In their briefs, the plaintiffs concede that "compliance with the requirements prescribed by the Regulations in regard to the filing of refund claims is a condition to the plaintiffs' right to maintain a suit for the recovery of taxes," and that "The Commissioner is entitled to be informed of the precise ground or grounds upon which recovery is sought so that he may properly direct his investigation of the sufficiency of the facts." The foregoing concessions are not over-generous on the plaintiffs' part, since they understate, if anything, the Supreme Court's exaction that "Even though formal, the condition upon which the consent to suit is given is defined by the words of the statute, and 'they mark the conditions of the claimant's right.' "

Yet at the close of their reply brief, the plaintiffs assert that "even if any doubt existed as to the

[3]See also Cheatham v. Norvekl, 92 U.S. 85, 88-89 (1876); Taylor v. Secor, 92 U.S. 575, 613-614 (1876); Snyder v. Marks, 109 U.S. 189, 193-194 (1883); Arnson v. Murphy, 115 U.S. 579, 584-586 (1885); Kings County Savings Institution v. Blair, 116 U.S. 200, 206 (1886); Auffmordt v. Hedden, 137 U.S. 310, 324 (1890); Rand v. United States, 249 U.S. 503, 507-510 (1919); Graham v. du Pont, 262 U.S. 234, 254-255 (1923); Tucker v. Alexander, 275 U.S. 228, 231 (1927); Angelus Milling Co. v. Commissioner, 325 U.S. 293, 296, 297-299 (1945); Harvey v. Early, 4 Cir., 160 F. 2d 836, 838 (1947); Cherokee Textile Mills v. Commissioner, 6 Cir., 160 F. 2d 685, 688 (1947).

sufficiency of the refund claims, it should be resolved in favor of the plaintiffs." Not only is this parting statement intrinsically erroneous, but it conflicts with the plaintiffs' earlier concessions to which reference has just been made. Inconsistency in argument usually indicates the weakness of a suitor's position.

6. The Taxpayer Cannot Urge Before the Court Any Grounds That Were Not Specified in His Claim for a Refund Filed With the Collector.

As a corollary of the rule just discussed, it is well settled that the complaining taxpayer is not permitted—absent an amended claim or a waiver by the Government—to urge before the Court any grounds for a refund not presented in his original claim filed with the Bureau of Internal Revenue.

In Real Estate-Land Title & Trust Co. v. United States, 309 U.S. 13, 17-18, the petitioner contended that it had abandoned a certain plant and hence was entitled to a deduction for "losses sustained during the taxable year and not compensated for by insurance or otherwise."

Of such a contention, the Court said:

> "Whether petitioner has satisfied those requirements we do not decide, for its claim for refund was based exclusively and solely on the ground that it was entitled to an allowance for obsolescence. Hence, in absence of a waiver by the government, Tucker v. Alexander * * * (supra), or a proper amendment, petitioner is precluded in this suit from resting its claim on another ground. (Case cited.)"

In Nemours Corporation v. United States, 3 Cir., 188 F. 2d 745, 750 (1951), certiorari denied, 342 U.S. 834 (1951), the Court thus expounded the doctrine:

> "The taxpaper stated as its ground for refund Section 26(f) (of the Revenue Act of 1936) and made its computation accordingly. That does not, under the decisions, give him (sic) a right to claim under some other section. (Cases cited.)
>
> "This is hard law, no doubt. Perhaps it is necessarily strict law in view of the scope of the operations of a fiscal system as large as that of the United States. Whether that is so we are not called upon to say. We apply the rule; we do not make it. It is to be observed that recovery of claims against the Government has always been the subject of a strict compliance requirement. The recovery of claims for tax refunds is but an application of this broad and strict rule."

Throughout their briefs, the plaintiffs insist that their "error" was "merely" one of "computation" of the "amount" of the refund claimed. The short answer to this argument is that Professor Einstein himself, unless he had known of the existence of Section 6 of the Current Tax Payment Act of 1943, could not have "computed" the plaintiffs' income tax returns so as to have invoked the "forgiveness" provisions of that statute!

7. Conclusion.

Accordingly, since the amended complaints assert against the defendant Berliner a "ground upon which a refund is claimed" that was not included in the claim filed with the Collector, the plaintiffs cannot recover any sum against the defendant Berliner.

On the other hand, since the Court finds that the plaintiff George French, Jr., was an employee rather than a co-partner or co-adverturer of Oranges Brothers Construction Department, both plaintiffs are entitled to avail themselves of the relief provisions of Section 107(a), as against the defendant Smyth.

Findings of fact and conclusions of law consistent with the foregoing are to be served and lodged by the plaintiffs.

Dated: October 14th, 1952.

/s/ DAL M. LEMMON,
United States District Judge.

[Endorsed]: Filed October 14, 1952.

[Title of District Court and Causes.]

Nos. 6257 and 6258

FINDINGS OF FACT AND CONCLUSIONS OF LAW

These suits are for the recovery of income taxes for the calendar year 1943, a portion of which were

collected by Collector James J. Smpth and a portion of which were collected by former Collector Harold A. Berliner. The original complaints were against the defendant James J. Smyth only and sought only to recover the amount paid to him with interest thereon as provided by law.

The cases were consolidated for trial and decision. The cause on the original complaint was tried before a jury on September 20th and 21st, 1950. The result was a special verdict and a judgment thereon in favor of the defendant Smyth. The plaintiffs' motion for a new trial was granted by this Court on November 22nd, 1950.

Plaintiffs thereafter filed a motion for leave to file amended complaints and to join as a party defendant Harold A. Berliner, the former Collector of Internal Revenue for the First Collection District of California. The defendant Smyth filed a motion for this Court to reconsider its order granting a new trial and to reinstate the jury's verdict. By order entered December 13, 1951, this Court denied the motion of defendant Smyth and granted the plaintiffs' motions for leave to file amended complaints and to join Berliner as a party defendant. The facts were stipulated in part and are found as stipulated. In addition, the parties have stipulated that these cases are submitted to the Court without a jury for decision upon the evidence introduced at the trial of the actions on September 20th and 21st, 1950, together with certain specified documents and stipulated facts.

The Court having accepted the stipulation and

having considered the evidence and the briefs of the parties, finds the facts and states the conclusions of law as follows:

Findings of Fact

1. This action is brought under 28 U. S. Code Section 1340 and Section 3772(a) (1) and (2) of the Internal Revenue Code for the recovery of income taxes alleged to have been illegally or erroneously assessed and collected.

2. That defendants, and each of them, are residents of the City and County of San Francisco, State of California; that defendant James G. Smyth was, at all times from May 15, 1945, to and including the date of this action, the duly appointed, qualified and acting Collector of Internal Revenue for the First Collection District of California; that defendant Harold A. Berliner was, at all times material herein prior to April 1st, 1945, the duly appointed, qualified and acting Collector of Internal Revenue for the First Collection District of California.

3. That plaintiffs are now, and at all times herein mentioned have been, citizens of the United States of America, and residents of the City of Stockton, County of San Joaquin, State of California within the said Northern District of California. That at all times during the years 1938 through 1943, inclusive, plaintiffs were married and all income received by plaintiff George French, Jr., was the community income of plaintiffs and was prop-

erly reportable upon a community basis. That within the time allowed by law therefor, plaintiffs caused to be prepared, executed and filed with the defendant Smyth, their respective income tax returns for the year 1943. That at all times herein mentioned plaintiffs herein kept their books of account and filed their income tax returns on the calendar year basis and on the cash receipts and disbursements method of accounting.

4. That plaintiffs herein, respectively, made the following payments and total net payments to Harold A. Berliner, as Collector of Internal Revenue for the First Collection District of California upon the dates, and in the amounts hereinafter indicated:

GEORGE FRENCH, JR.		MARY FRENCH	
Date of Payment	Amount	Date of Payment	Amount
7-15-43	$29,451.94	7-15-43	$29,569.95
9-15-43	26,219.78	9-15-43	26,160.78
12-15-43	13,701.94	12-15-43	13,406.13
1943 payment by employer of amount withheld from compensation	11,521.56	1943 payment by husband's employer of amount withheld from compensation	11,521.56
Total	$80,895.22	Total	$80,658.42
LESS: overpayment refunded	11,745.10	LESS: overpayment refunded	11,508.88
Total net payment equal to net liability per 1943 return	$69,150.12	Total net payment equal to net liability per 1943 return	$69,149.54

No part of said total net payments has been refunded or scheduled for refund to plaintiffs, or either of them.

5. That plaintiffs made, respectively, the following payments on account of an asserted deficiency of income tax and interest to James G. Smyth as Collector of Internal Revenue for the First Collection District of California, on the dates and in the amounts indicated below:

Date of Payment	George French, Jr.	Mary French
November 26, 1946	$27,779.18	$27,779.18
June 5th, 1947	4,939.41	4,938.47
Total Payments	$32,718.59	$32,717.65

No part of said total payments has been refunded or scheduled for refund to plaintiffs, or either of them.

6. That at all times during the period from November 15, 1938, to May 31st, 1943, Oranges Brothers Construction Department was a partnership, carrying on a general contracting business at Stockton, California; that at all of said times, plaintiff George French, Jr., was employed as the Superintendent of Construction by said Oranges Brothers Construction Department; that such employment was on a fixed salary and commission basis under an agreement of employment whereby the said George French, Jr., was to receive a fixed salary of $150.00 per month and also was entitled to receive one-half (½) of the net profits of said construction and contracting business. That George French, Jr., was simply an employee and was never a partner or joint venturer in or with Oranges Brothers Construction Department.

7. That George French, Jr., received for his personal services under said contract of employment a total compensation of $429,196.69, of which 4.85% or $20,827.87 was received prior to January 1st, 1943, and 95.15% or $408,368.82 was received during the taxable year 1943, to wit, the sum of $75,-062.50 on February 8th, 1943, and $333,306.32 after May 31st, 1943.

8. There is attached to each plaintiff's 1943 income tax return a Schedule "M" consisting of six pages of computations. The first page shows the allocation of income over the period of George French, Jr.'s, employment in accordance with the provisions of Section 107(a) Internal Revenue Code as follows:

GEORGE FRENCH, JR.
COMPENSATION RECEIVED FOR PERIOD OF MORE THAN 36 MONTHS (SEC. 107(a))

Period of Services November 15, 1938 to May 31, 1943

1. Received February 8, 1943, allocable over period of 51 months	$ 75,062.50
2. Received after May 31, 1943, allocable over period of 55 months	333,306.32
Total	$408,368.82

	Allocation of Item 1	Allocation of Item 2	Total
1938 2 months	$ 2,943.63	$ 12,120.24	$ 15,063.87
1939 12 "	17,661.77	72,721.37	90,383.14
1940 12 "	17,661.77	72,721.37	90,383.14
1941 12 "	17,661.77	72,721.37	90,383.14
1942 12 "	17,661.74	72,721.37	90,383.11
1943 1 and 5 mos.	1,471.82	30,300.60	31,772.42
Total	$75,062.50	$333,306.32	$408,368.82

Total Compensation in 1943 and Prior Years

	Amount	Percent
1938	$	
1939	1,500.00	
1940	1,800.00	
1941	1,800.00	
1942	15,727.87	
Total prior years	$ 20,827.87	4.85
1943 as above	408,368.82	95.15
Total	$429,196.69	100.00

9. The last page of said Schedule "M" contains a computation of the plaintiff's income tax liabilities on the income allocated to the calendar year 1942 which computation reads as follows:

Year 1942	George French, Jr.		Mary E. French
Net income per amended return	$ 7,764.34		$ 7,764.33
Amount taxable per sec. 107(a)	45,191.55		45,191.56
Total for computation	$52,955.89		$52,955.89
Less:			
Personal exemption $454.17		$745.83	
Credit for dependent 291.67	$745.84		$745.83
Surtax net income	$52,210.05		$52,210.06
Less: earned income credit	1,400.00		1,400.00
Balance subject to normal tax	$50,810.05		$50,810.06
Normal tax	$ 3,048.60		$ 3,048.60
Surtax	24,698.63		24,698.64
Total	$27,747.23		$27,747.24
Less income tax per item 17, p. 4	1,598.96		1,598.96
Balance tax at 1942 rate	$26,148.27		$26,148.28

The plaintiffs did not claim forgiveness of seventy-five per cent (75%) of their 1942 income tax liabilities in accordance with Section 6 of the Current Tax Payment Act.

10. Plaintiffs' said income tax returns, both for the calendar year 1943, were audited by Internal Revenue Agent, Robert L. Driscoll, who made a report dated July 5th, 1945, holding that George French, Jr., was a partner in Oranges Brothers Construction Department instead of an employee, and that therefore the plaintiffs' 1943 income taxes must be computed without reference to the provisions of Section 107(a) of the Internal Revenue Code.

11. Plaintiffs filed a protest with the Internal Revenue Agent in Charge at San Francisco, California, and after a hearing upon the said protest, a conference report was issued under date of February 25, 1947. The said conference report sustained the determination of Internal Revenue Agent Driscoll that George French, Jr., was a partner in Oranges Brothers Construction Company, and assessed a total income and victory tax liability for the said year 1943 against George French, Jr., in the amount of $97,293.23, and a deficiency of $32,718.59 consisting of income taxes in the amount of $28,143.10 and interest in the amount of $4,575.49. That the said deficiency in the total amount of $32,718.59 was paid in full by George French, Jr., to the defendant James G. Smyth, who was then Collector of Internal

Revenue for the First Collection District of California, upon the following dates, to wit:

November 26, 1946.....$27,779.18
June 5, 1947..... 4,939.41

That said conference report assessed a total income and victory tax liability against Mary E. French for the said year 1943 in the amount of $97,291.87 and assessed a deficiency of $32,717.65 consisting of taxes in the amount of $28,142.33 and interest in the amount of $4,575.32. That said assessed deficiency in the total amount of $32,717.65 was paid in full by the plaintiff Mary E. French to the defendant James G. Smyth, who was then Collector of Internal Revenue for the First Collection District of California, on the following dates, to wit:

November 26, 1946.....$27,779.18
June 5, 1947..... 4,938.47

12. That on the 28th day of December, 1948, and within the time allowed under the provisions of Internal Revenue Code Section 322(b)(3) thereof, plaintiffs caused to be prepared, executed and filed, claims for the refund of taxes and interest assessed by the Commissioner of Internal Revenue for the year 1943, and collected by the defendant Smyth on the dates above set forth. That each of the said claims for refund contains the following statement of grounds why the said refund claims should be allowed:

"The claimant was assessed in error deficiencies in income and victory taxes for the taxable period

shown above, which were paid in full on November 26, 1946, and June 5, 1947, on the basis of a report of Internal Revenue Agent Robert L. Driscoll dated July 5, 1945, and a conference statement under the symbols 'IRA:Conf. HVH' issued by the office of the Internal Revenue agent in charge at San Francisco, California, under date of February 25, 1947, which report and statement are incorporated herein by reference. The whole amount of the deficiencies $28,143.10, is claimed for refund with the interest paid thereon $4,575.49, together with the interest on the total overpayment claimed for refund according to law.

"The claimant claims specifically as a basis for the refund claimed herewith that his Form 1040 income and victory tax return for the calendar year 1943, showing a total income and victory tax liability of $69,150.12, and his amended Form 1040 income tax return for the calendar year 1942, were in all respects true and correct returns of his taxable income and income and victory taxes for those years, and that the assessments of deficiencies on the said return for the calendar year 1943, were, with reference to the report and statement described above and incorporated herein by reference, based on the following errors:

> "(1) The disallowance of the application of the provisions of Section 107, Internal Revenue Code, in limitation of his income and victory tax liability on compensation for services received in 1943, for services during and for a

period of more than 36 months, as computed in his said return for 1943:

"(2) The computation of his income from services during the years 1942 and 1943, on the theory that, and as if he had been a member of a partnership, Oranges Brothers Construction Division; and * * *"

13. That by registered notice dispatched on November 7th, 1949, each plaintiff herein was notified that the said claims for refund had been disallowed in their entirety by the Commissioner of Internal Revenue.

14. The parties hereto have stipulated that in the event the plaintiffs are entitled to recover judgment against defendant Harold A. Berliner, judgment against Harold A. Berliner should be in favor of the plaintiff George French, Jr., in the amount of $19,726.79 with interest thereon from March 15, 1944, and in favor of the plaintiff Mary E. French in the amount of $19,490.80, with interest thereon, from March 15, 1944.

15. The parties have stipulated that in the event the Court shall find for the plaintiff George French, Jr., as against the defendant James G. Smyth, judgment shall be entered against the defendant James G. Smyth for $32,718.59, with interest on $27,779.18 from November 26, 1946, and with interest on $4,939.41 from June 5th, 1947.

16. The parties have stipulated that in the event the Court shall find for the plaintiff Mary E.

French, as against the defendant James G. Smyth, judgment shall be entered against the defendant James G. Smyth for $32,578.28, with interest on $27,639.81 from November 26th, 1946, and with interest on $4,938.47 from June 5th, 1947.

Conclusions of Law

1. Plaintiffs have complied with all of the statutory requirements constituting conditions precedent to the institution and maintenance of this action against the defendant James G. Smyth.

2. This Court has jurisdiction under Title 28 USC Section 1340.

3. Plaintiffs are entitled to compute their income tax liabilities for the calendar year 1943, in acordance with the provisions of Section 107(a) Internal Revenue Code.

4. Plaintiff George French, Jr., is entitled to judgment against defendant James G. Smyth for $32,718.59, together with interest on $27,779.18 of said sum from November 26th, 1946, and with interest on $4,939.41 from June 5th, 1947.

5. Plaintiff Mary E. French is entitled to judgment against defendant James G. Smyth for $32,-578.28 with interest on $27,639.81 of said sum from November 26, 1946, and with interest on $4,938.47 from June 5th, 1947.

6. The amended complaints assert against defendant Berliner a "ground upon which a refund is claimed" that was not included in the refund

claims filed with the Collector, to wit: A claim that plaintiffs are entitled to forgiveness of seventy-five per cent (75%) of the tax on income allocated to 1942, by virtue of Section 6 of the Current Tax Payment Act.

7. Plaintiffs cannot recover any sum against the defendant Harold A. Berliner.

Dated: This 4th day of November, 1952.

/s/ DAL M. LEMMON,
Judge of the United States District Court.

Receipt of copy acknowledged.

Lodged October 28, 1952.

[Endorsed]: Filed November 4, 1952.

In the District Court of the United States in and for the Northern District of California, Southern Division

No. 6257

GEORGE FRENCH, JR.,

Plaintiff,

vs.

JAMES G. SMYTH, Collector of Internal Revenue, and HAROLD A. BERLINER, Former Collector of Internal Revenue,

Defendants.

No. 6258

MARY E. FRENCH,

Plaintiff,

vs.

JAMES G. SMYTH, Collector of Internal Revenue, and HAROLD A. BERLINER, Former Collector of Internal Revenue,

Defendants.

JUDGMENT

The above-entitled causes having been submitted to the Court without a jury for decision upon the evidence, oral and documentary, introduced at the trial of the actions against the defendant James G. Smyth on September 20th and 21st, 1950, such evidence being supplemented by specified documents and stipulated facts, and the Court having heretofore made and cause to be filed herein its written Findings of Fact and Conclusions of Law, and being fully advised;

Wherefore, by reason of the law and the Findings of Fact aforesaid,

It Is Ordered, Adjudged and Decreed that the plaintiffs do have and recover of and from the defendants as follows:

1. That plaintiffs, and either of them, take nothing against the defendant Harold A. Berliner.

2. That plaintiff George French, Jr., recover of and from the defendant James G. Smyth the sum of $32,718.59 together with interest thereon at the rate of six per cent (6%) per annum from the date

of payment specified below, to a date preceding the date of the refund check by not more than thirty (30) days, to wit:

(a) On $27,779.18 from November 26, 1946.

(b) On $4,939.41 from June 5, 1947.

3. That plaintiff Mary E. French recover of and from the defendant James G. Smyth the sum of $32,578.28 together with interest thereon at the rate of six per cent (6%) per annum from the date of payment specified below, to a date preceding the date of the refund check by not more than thirty (30) days, to wit:

(a) On $27,639.81 from November 26, 1946.

(b) On $4,938.47 from June 5, 1947.

The Court hereby certifies that there was probable and reasonable cause for the act of the defendant James G. Smyth, former Collector of Internal Revenue, in demanding and collecting from the plaintiffs the income taxes for the refund of which this judgment is entered.

Dated This 4th Day of November, 1952.

/s/ DAL M. LEMMON,
Judge of the United States
District Court.

Receipt of copy acknowledged.

[Endorsed]: Filed November 4, 1952.

Entered November 4, 1952.

[Title of District Court and Causes.]

Nos. 6257 and 6258

NOTICE OF APPEAL

George French, Jr., and Mary E. French, the plaintiffs in the above-entitled actions, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the portion of the judgment hereinafter designated, which judgment was dated, filed and entered on November 4, 1952. The portion of the judgment appealed from reads as follows:

> "1. That plaintiffs, and either of them, take nothing against the defendant Harold A. Berliner."

Dated: December 30th, 1952.

GEORGE FRENCH, JR.

MARY E. FRENCH,

By /s/ CLYDE C. SHERWOOD,

Attorney for Plaintiffs.

[Endorsed]: Filed January 2, 1953.

[Title of District Court and Causes.]

Nos. 6257 and 6258

STATEMENT OF POINTS ON APPEAL

The plaintiffs and appellants George French, Jr., and Mary E. French, in accordance with the provisions of Rule 75(d) of the Federal Rules of Civil Procedure state that the points upon which they intend to rely on their appeal are:

1. The refund claims filed by plaintiffs on December 28, 1948, with the then Collector of Internal Revenue, copies of which refund claims are attached to the original complaints on file in the above-entitled actions, are sufficient within the meaning of Section 3772 of the Internal Revenue Code and pertinent Treasury Regulations to sustain the recoveries sought in the amended complaints on file in the above-entitled actions against the defendant Harold A. Berliner, computed on the basis of the forgiveness provisions of Section 6 of the Current Tax Payment Act of 1943, 26 USCA, Internal Revenue Acts, pages 406-411.

GEORGE FRENCH, JR.,

MARY E. FRENCH,

By /s/ CLYDE C. SHERWOOD,
Attorney for Plaintiffs.

Affidavit of service by mail attached.

[Endorsed]: Filed January 7, 1953.

[Title of District Court and Causes.]

Nos. 6257 and 6258

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing and accompanying documents listed below, are the originals filed in this Court in the above-entitled case, and that they constitute the record on appeal herein as designated by the parties.

Complaint (6257).

Complaint (6258).

Answer (6257).

Answer (6258).

Demand for jury trial (6257).

Demand for jury trial (6258).

Special verdict.

Judgment on special verdict.

Notice of motion for a new trial.

Order granting motion for a new trial.

Motion for leave to file amended complaint and to join Harold A. Berliner as a party defendant (6257).

Motion for leave to file amended complaint and to join Harold A. Berliner as a party defendant (6258).

Motion to reconsider order granting a new trial and to reinstate verdict.

Order granting leave to file amended complaint, etc.

Amended complaint (6257).
Amended complaint (6258).
Answer to amended complaint (6257).
Answer to amended complaint (6258).
Stipulation waiving trial by jury.
Stipulation of facts.
Memorandum opinion and order.
Findings of fact and conclusions of law.
Judgment.
Defendants' notice of appeal (6257).
Defendants' notice of appeal (6258).
Plaintiffs' notice of appeal.
Cost bond on appeal.
Statement of points on appeal.
Designation of contents of record on appeal.
Plaintiffs' exhibits 1 to 7, inclusive.
Defendants' exhibits A to D, inclusive.
Order extending time to docket appeal.
Order extending time to docket appeal.

In Witness Whereof, I have hereunto set my hand and the Seal of said Court, this 27th day of February, 1953.

C. W. CALBREATH,
Clerk.

By /s/ C. C. EVENSON,
Deputy Clerk.

[Endorsed]: No. 13729. United States Court of Appeals for the Ninth Circuit. George French, Jr., and Mary E. French, Appellants, vs. Harold A. Berliner, former Collector of Internal Revenue, Appellee. Transcript of Record. Appeals from the United States District Court for the Northern District of California, Northern Division.

Filed February 28, 1953.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13729

JAMES G. SMYTH, Collector of Internal Revenue, and HAROLD A. BERLINER, Former Collector of Internal Revenue,

Defendants and Appellants,

vs.

GEORGE FRENCH, JR., and MARY E. FRENCH,

Plaintiffs and Appellees,

GEORGE FRENCH, JR., and MARY E. FRENCH,

Plaintiffs and Appellants,

vs.

HAROLD A. BERLINER, Former Collector of Internal Revenue,

Defendant and Appellee.

STATEMENT OF POINTS AND AMENDED DESIGNATION OF RECORD ON APPEAL

George French, Jr., and Mary E. French, Plaintiffs and Appellants herein, hereby adopt the Statement of Points on Appeal filed January 7, 1953, on behalf of Plaintiffs and Appellants in the District Court of the United States in and for the Northern District of California, Southern Division (Actions Nos. 6257-6258), as compliance with the provisions of Rule 19(6) of the above-entitled Court.

George French, Jr., and Mary E. French, Plaintiffs and Appellants herein, hereby withdraw the Designation of Record contained in "Statement of Points and Designation of Record on Appeal" filed March 5, 1953, and, in accordance with Rule 19(6) hereby designate the following portions of the record, proceedings and evidence as the portions to be contained in the record on appeal:

1. Original complaints, together with exhibits attached thereto, of George French, Jr., and Mary E. French, respectively, and the answers thereto:
2. Judgment on special verdict;
3. Notice of motion for new trial;
4. Order granting motion for new trial;
5. Amended complaints of George French, Jr., and Mary E. French, respectively, and the answers thereto;
6. Plaintiffs' Exhibit 6, 1943 income tax returns for George French, Jr., and Mary E. French;
7. Plaintiffs' Exhibit 7, Conference Report dated 2-25-1947;

8. Motions of George French, Jr., and Mary E. French, respectively, for leave to file amended complaints and to join Harold A. Berliner as a party defendant, exclusive of amended complaints and memoranda of points and authorities in support of motions.

9. Affidavits of Frank C. Scott in support of plaintiffs' motion for leave to file an amended complaint attached to each of the motions specified under paragraph 8;

10. Order entered December 13, 1951, denying motion of defendant James G. Smyth to reconsider the order granting a new trial and to reinstate jury verdict and granting plaintiffs' motion for leave to file amended complaints and to join Harold A. Berliner as a party defendant;

11. Stipulation of the parties dated July 24, 1952, and filed July 26, 1952, exclusive of Exhibit E through L attached thereto;

12. Memorandum opinion filed October 14, 1952;

13. Findings of fact and conclusions of law filed November 4, 1952;

14. Judgment entered November 4, 1952.

Dated: March 20, 1953.

SHERWOOD & LEWIS,

By /s/ CLYDE C. SHERWOOD,

Attorneys for Plaintiffs and Appellants George French, Jr. and Mary E. French.

Receipt of copy acknowledged.

[Endorsed]: Filed March 20, 1953.

No. 13,729

IN THE

United States Court of Appeals

For the Ninth Circuit

GEORGE FRENCH, JR., and MARY E. FRENCH,

Appellants,

vs.

HAROLD A. BERLINER, Former Collector of Internal Revenue,

Appellee.

Appeal from the United States District Court, Northern District of California, Northern Division.

APPELLANTS' OPENING BRIEF.

CLYDE C. SHERWOOD,
703 Market Street, San Francisco 3, California,
Attorney for Appellants.

JOHN V. LEWIS,
M. L. LIEBERMAN,
703 Market Street, San Francisco 3, California,
Of Counsel.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Cases

Statutes

Texts

Miscellaneous

No. 13,729

IN THE

United States Court of Appeals

For the Ninth Circuit

GEORGE FRENCH, JR., and MARY E. FRENCH,

Appellants,

vs.

HAROLD A. BERLINER, Former Collector of Internal Revenue,

Appellee.

Appeal from the United States District Court, Northern District of California, Northern Division.

APPELLANTS' OPENING BRIEF.

OPINION BELOW.

The Memorandum Opinion of the District Court (R. 56-70) is reported at 110 F. Supp. 795.

JURISDICTION.

The appeal involves federal income taxes for the calendar year 1943. Part of the taxes in dispute, to-wit, in the amounts of $19,726.79 and $19,490.80, respectively, were paid to Harold A. Berliner, former

Collector of Internal Revenue for the First Collection District on or before March 15, 1944 with the filing of appellants' 1943 income tax returns. (Finding of Fact No. 4, R. 73, and No. 14, R. 80.) The remainder of the taxes in dispute, to-wit, in the amounts of $32,718.59 and $32,717.65, respectively, were paid to former Collector James G. Smyth on November 26, 1946 and on June 5, 1947. (Findings of Fact Nos. 10 and 11, R. 77-78, and Nos. 15 and 16, R. 80-81.)

The payments of taxes to former Collector James G. Smyth were made pursuant to a deficiency determination rendered by the Commissioner of Internal Revenue through the Internal Revenue Agent in Charge at San Francisco, California. Said deficiency determination was based upon a conference statement dated February 25, 1947 which sustained the examining Revenue Agent's finding contained in a Revenue Agent's Report dated July 5, 1945 to the effect that appellant, George French, Jr. was a partner rather than an employee of the firm Oranges Brothers Construction Department and that therefore the appellants were not entitled to compute their respective tax liabilities for 1943 in accordance with the relief provisions of Section 107(a) of the Internal Revenue Code, 26 USC Section 107(a). (Findings of Fact Nos. 10 and 11, R. 77-78.)

On the 28th day of December, 1948 and within the time allowed by law, claims for refund on Form 843 were filed by appellants, seeking a refund of income taxes for the year 1943 in the respective amounts

of $32,718.59 and $32,717.65, these being the amounts paid to former Collector Smyth pursuant to the deficiency determinations aforesaid. The refund claims incorporated by reference the Revenue Agent's Report dated July 5, 1945 and the Conference Statement dated February 25, 1947 and assigned as errors of such Report and Conference Statement the holdings (1) that George French, Jr. was treated as a partner rather than an employee of the Oranges Brothers Construction Department; and (2) that appellants were barred from computing their 1943 tax liabilities in accordance with the relief provisions of Section 107(a). (Finding of Fact No. 12, R. 78-80; Refund Claims, R. 9-10 and 16-18.)

The refund claims filed by appellants as aforesaid were disallowed in their entirety by the Commissioner of Internal Revenue pursuant to registered notices dispatched on November 7, 1949. (Finding of Fact No. 13, R. 80.)

These actions were brought in the District Court by the filing of the original complaints on December 9, 1949. (R. 10 and 18.) In the original complaints, appellants named James G. Smyth, then Collector of Internal Revenue for the First Collection District of California, as the only defendant seeking recovery of the respective amounts of $32,718.59 and $32,717.65, these amounts being the precise amounts set forth in the refund claims and paid as aforesaid to the said Smyth pursuant to the deficiency assessments based upon the Revenue Agent's Report of July 5,

1945 and the Conference Statement of February 25, 1947. (See: Original Complaints, especially paragraphs III, IV and V thereof, R. 4-6 and 12-14; see, also, Stipulation, paragraphs 5 and 6, R. 52-53, and paragraph 8, R. 54-55.) The jurisdiction of the District Court rested on Title 28, United States Code, Section 1340.

The cause, on the original complaints, was tried before a jury and the result was a special verdict and judgment thereon in favor of the defendant Smyth. (R. 25-27.) The District Court having granted appellants' motion for a new trial, the appellants filed a motion for leave to file amended complaints and to join Harold A. Berliner, former Collector of Internal Revenue, as a party defendant. By order entered December 13, 1951, the District Court granted appellants' said motion. The order preserved the defendant's right thereafter to raise the question as to whether the refund claims as filed before bringing suit, supported the additional recoveries sought in the amended complaints against the defendant Harold A. Berliner. (R. 30-33.) Pursuant to the aforesaid order, appellants filed amended complaints, joining former Collector Harold A. Berliner as a party defendant. (R. 34-44.)

In the amended complaints appellants sought against defendant James G. Smyth the same recoveries prayed for in the original complaints but, in addition, sought against the defendant Berliner recoveries in the amounts of $19,726.79 and $19,490.80,

respectively, with interest from March 15, 1944. Whereas the overpayments sought to be recovered against the defendant Smyth represented deficiencies assessed and paid after the filing of appellants' 1943 tax returns, the overpayments against the defendant Berliner were claimed to have resulted from an overstatement of appellants' tax liabilities on the returns themselves, due to an erroneous computation of such liabilities under the provisions of Section 107(a) which appellants purported to apply in the preparation of the returns. (Par. III of Amended Complaints, R. 36-37 and 41-42 and prayers, R. 38-39 and 44.)

The cause, on the amended complaints, was not retried, but by stipulation filed on July 28, 1952 was submitted to the District Court for decision upon the evidence theretofore introduced at the trial, and certain facts set forth in, and certain specified documents attached to, said stipulation. (Stipulation, R. 50-55.)

The District Court awarded appellants judgment against the defendant Smyth in accordance with the prayer of the original and amended complaints, but denied the recoveries sought against the defendant Berliner in the amended complaints. The District Court placed its decision upon the ground that, as against the defendant Berliner, appellants had in their amended complaints asserted a ground of liability not included in the refund claims upon which the suits were based. (Memorandum Opinion, R. 70, Conclusions of Law, Nos. 4, 5 and 6, R. 81-82; Judgment, R. 83-84.)

The judgment of the District Court was entered on November 4, 1942 (R. 84) and on January 2, 1953 appellants filed notice of appeal, appealing from the portion of the judgment which denied them recovery against the defendant Harold A. Berliner (R. 85). The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1291.

STATEMENT OF THE CASE PRESENTING THE QUESTIONS INVOLVED AND THE MANNER IN WHICH THEY ARE RAISED.

1. Review of the controversy between the taxpayers, appellants herein, and the Bureau of Internal Revenue.

In preparing their 1943 income tax returns, appellants (hereinafter also referred to as the taxpayers) claimed the benefit of the relief provisions of Section 107(a) and, as part of said returns, submitted Schedule M setting forth in detail the computation of their respective liabilities under Section 107(a). (Findings of Fact Nos. 8 and 9, R. 75-76.) The returns were actually prepared and the computations made by taxpayers' consultant Frank C. Scott, C.P.A. of Stockton, California. (See: Affidavit of Frank C. Scott, R. 31-32.)

Section 107(a) provides, in effect, that a taxpayer's liability on income subject to the provisions of the Section, shall not exceed the aggregate of the liabilities computed on such income upon the hypothesis that the income was ratably received or allocable over the applicable period of years preceding the receipt

of the income. Accordingly one of the steps in computing a taxpayer's tax liability under Section 107(a) is to compute the "hypothetical" liability for each of the years over which the income received during the taxable year (1943 in our case) has been allocated. These years in the instant case included the "forgiveness year" 1942. (Finding of Fact No. 8, R. 75.)

In computing, on Schedules M of their returns, the taxpayers' "hypothetical" income tax on the income allocated to the year 1942, Mr. Scott did not claim forgiveness of 75% of such tax in accordance with the "forgiveness provisions" of Section 6 of the Current Tax Payments Act of 1943, 57 U. S. Stat. at L. 126, 26 USCA Internal Revenue Acts pp. 406-411. (Finding of Fact No. 9, R. 76-77.) As the result of such failure to reduce the tax on income allocated to the year 1942 in accordance with the "forgiveness feature" of the Current Tax Payments Act, taxpayers' returns overstated their respective income tax liabilities under Section 107(a) by the amounts of $19,726.79 and $19,490.80, respectively, representing seventy-five per cent of the tax on the income allocated to the 1942 income per Schedules M of the returns. These are the amounts sought to be recovered in the amended complaints against the defendant Harold A. Berliner, appellee herein. (Findings of Fact Nos. 9 and 14, R. 76 and 80.)

The sole reason why the taxpayers' accountant did not apply the forgiveness feature in preparing Schedule M of the 1943 returns was his compliance

with a Treasury Ruling (Reg. Section 36.6(b), T. D. 5300, 1943 C. B. p. 43, at p. 58) to the effect that taxpayers computing their 1942 or 1943 taxes under the provisions of Section 107(a) were not entitled to the benefits of Section 6 of the Current Tax Payments Act in the computation of the Section 107(a) tax on income allocable to a forgiveness year. (Affidavit of Frank C. Scott, R. 31-32.) Said Section 36.6(b) was later overruled by *William F. Knox,* 10 T. C. 550. The Commissioner of Internal Revenue published his acquiescence in the *Knox* decision in April, 1949. (C.B. 1949-1, p. 37.)

Following an audit of the taxpayers' 1943 returns, the examining Revenue Agent in his audit report dated July 5, 1945, held that the taxpayers were not entitled to compute their respective income tax liabilities for 1943 under the relief provisions of Section 107(a) of the Internal Revenue Code upon the ground that the appellant George French, Jr. was a partner, not an employee of the Oranges Brothers Construction Department. (Finding of Fact No. 10, R. 77.)

Throughout the entire controversy the parties were in agreement that appellants' right to avail themselves of the provisions of Section 107(a) depended upon whether the relationship between appellant George French, Jr. and the Oranges Brothers Construction Department constituted an employment as distinct from a partnership or joint venture.

The Conference Statement dated February 25, 1947 sustained the Revenue Agent's holding and assessed

the tax deficiencies in the amounts of $32,718.59 and $32,717.65, respectively. These were subsequently paid to the defendant Smyth and sought to be recovered by appellants in their refund claims and in these actions. (Finding of Fact No. 11, R. 77-78.)

In their refund claims duly filed before the actions were brought, appellants set forth as the basis of such claims the correctness of their 1943 tax returns and assigned as errors underlying the deficiency assessments, among others, the holdings of the Revenue Agent's Report and Conference Statement (which were incorporated in the claims) to the effect that (1) Section 107(a) was inapplicable to appellants' 1943 income; and (2) that appellant George French, Jr. was treated as a partner rather than an employee of the firm Oranges Brothers Construction Department. The amounts sought to be recovered in the refund claims were those paid pursuant to deficiency determination to Collector James G. Smyth. The claims did not specifically demand recovery of any of the taxes paid on the 1943 returns to former Collector Berliner inasmuch as the claims purported to adhere to the tax computations set forth on the returns and made without the consideration of the forgiveness feature. (Refund Claims, R. 8-10.) In this connection, it is pointed out that the refund claims were likewise computed by Mr. Frank C. Scott and were filed subsequent to the *Knox* decision and to *Arthur I. Schmidt,* 10 T. C. 550, to-wit, on December 28, 1948 but *prior* to the acquiescence therein by the

Commissioner of Internal Revenue which was published in April, 1949. (Affidavit of Frank C. Scott, R. 32: Refund Claims, R. 10 and 18.)

The Commissioner of Internal Revenue disallowed appellants' refund claims in their entirety. (Finding of Fact No. 13, R. 80.)

The answers to the original and amended complaints deny the existence of the employment relationship between appellant George French, Jr. and the Oranges Brothers Construction Department, deny the invalidity of the deficiency assessments paid to Collector Smyth, and further deny the allegations set forth in the refund claims, thus reaffirming the prior contention of the Bureau of Internal Revenue that appellants did not qualify for the benefits of Section 107(a) which contention is specifically set forth in the answers to the amended complaints. (Paragraphs III and IV of answers, R. 19-21 and 22-24; Paragraphs III and IV of answers to amended complaints, R. 45-47 and R. 48-49.)

2. Statement of procedural problem.

The only substantive issue ever raised between the taxpayers, appellants herein, on the one hand, and the Bureau of Internal Revenue and the defendant collectors on the other, during both the administrative and judicial phase of this controversy, was whether the taxpayers were entitled to compute their respective income tax liabilities for the calendar year 1943 in accordance with the relief provisions of Section 107(a) of the Internal Revenue Code, 26 USC

Section 107(a). The taxpayer-husband, George French, Jr. was employed as the superintendent of construction by Oranges Brothers Construction Department, a partnership, and his compensation was measured by a percentage of the profits. (Finding of Fact No. 6, R. 74.) The Bureau of Internal Revenue consistently held that the arrangement between George French, Jr. and the Oranges Brothers Construction Department constituted a copartnership, or joint venture. The taxpayers consistently contended that George French, Jr. was an employee of the construction company. If George French, Jr. was a copartner or joint venturer, then the taxpayers, concededly, did not qualify for the relief provided in Section 107(a) of the Code and their respective tax liabilities were correctly assessed by the Commissioner of Internal Revenue. If, on the other hand, George French, Jr. was an employee of the construction company, then admittedly, the taxpayers *were* entitled to have their income tax liabilities computed in accordance with Section 107(a) and the assessments were erroneous and excessive. The Revenue Agent's Report and Conference Statement pursuant to which the deficiency assessments were made, the rejected refund claims and the answers filed in the actions below, all present the single contention that plaintiffs were not entitled to have their tax liabilities computed in accordance with Section 107(a). (Finding of Fact No. 8, R. 75, Findings of Fact Nos. 10 and 11, R. 77 and 78; Refund Claims, R. 9 and 16-17; see paragraphs III, IV and V, of original complaints, R. 4-7 and 12-15; para-

graphs III, IV and V of answers, R. 20-21 and 22-24; paragraph 2 of Memorandum Opinion entitled "Questions Presented", R. 58-59.) To the contrary, the trial Court found, as a fact, that George French, Jr. was an employee of the construction company and that the taxpayers were, therefore, as a matter of law, entitled to avail themselves of the relief provisions of Section 107(a). (Finding of Fact No. 6, R. 74; Conclusion of Law No. 3, R. 81.) Accordingly, the District Court awarded appellants judgment against the defendant Smyth in accordance with the prayer of the original and amended complaints. The defendant Smyth having dismissed his appeal, the appellants' right to the benefits of Section 107(a) has become settled by final decision.

Not only has appellants' right to compute their 1943 tax liabilities in accordance with Section 107(a) become incontrovertible, but the results of such computation are equally beyond the realm of dispute. Under the rule of law promulgated in the *Knox* case and now recognized by the Commissioner of Internal Revenue, appellants' respective tax liabilities and tax overpayments for the year 1943 are as set forth in their amended complaints; that is to say, appellants have admittedly overpaid their 1943 taxes not only by the amounts sought to be recovered from the defendant Smyth, but additionally by the amounts sought to be recovered from the defendant Berliner, appellee herein. In short, the Government has admittedly been unjustly enriched by the money which should never have been assessed and collected by for-

mer Collector Berliner, and its position simply is that it can retain such unjust enrichments because of an alleged defect in the refund claims filed by appellants.

The District Court below sustained the position of the Government as to the overpayments sought to be recovered in the amended complaints from the appellee herein. These overpayments, it will be recalled, are attributable to the application of the forgiveness provisions of the Current Tax Payments Act in the computation of appellants' 1943 tax liabilities under Section 107(a). The District Court was of the opinion that the applicability of the forgiveness feature in the computation of appellants' tax liabilities under Section 107(a) was a "ground for refund", separate and distinct from the basic ground concerning appellants' eligibility for the benefits of the section. The District Court further held that the "ground" relative to the applicability of the forgiveness feature underlying appellants' claim against the defendant Berliner had not been set forth in the refund claims which merely sought recovery of the amounts paid as deficiencies to Collector Smyth. Accordingly, the Court concluded that as to the defendant Berliner, appellee herein, there was a fatal "variance" between the refund claims and the amended complaints which precluded the recovery of the admitted overpayments made to the said Berliner as a result of appellants' failure to take advantage of the forgiveness feature in computing their 1943 taxes. (Memorandum Opinion at R. 59 and 70.)

In opposition to the appellee's contention and the District Court's holding, appellants contend that once the basic issue or "ground" plainly set forth in the refund claims is resolved, namely that appellants are entitled to the benefits of Section 107(a), then the resulting tax liability and amount of refund is a mere matter of computation under the plain provisions of the income tax law, which include the application of the forgiveness provisions of the Current Tax Payments Act; moreover all of the facts and data necessary for the computation of the tax liability and refund according to the statutes are set forth in the schedules M attached to taxpayers' 1943 tax returns which are incorporated by reference in the refund claims. Thus appellants' failure, in their refund claims, to take into account the forgiveness feature and to compute the refunds in amounts which included the overpayments made to former Collector Berliner is no more than an omission of a *computational detail,* or an error as to the *amount* of the refund, neither of which is fatal to recovery.

QUESTION PRESENTED.

Did the amended complaints assert, as against the defendant Berliner, appellee herein, a "ground upon which a refund is claimed" that was not included in the refund claims filed by appellants on December 28, 1948 and attached to the original complaints on file herein; or, conversely, were the said refund claims sufficient within the meaning of Section 3772(a)(1)

of the Internal Revenue Code and pertinent Treasury Regulations (Reg., Section 29.322-3) to support the recoveries sought against the appellee in the amended complaints?

In the argument hereinafter contained appellants propose to show:

I. That the claims in question met all of the requirements of the statutes, regulations and Court decisions as to their sufficiency in form and content;

II. That the District Court's holding to the contrary is not supported by the authorities on which it relied; and

III. That the District Court misconstrued the law in holding that failure to take into account the forgiveness feature of the Current Tax Payment Act went to the substance of the claims rather than merely to the routine computation of the tax.

STATUTE AND REGULATIONS INVOLVED.

The applicable provisions of the Statute and Regulations are set forth in Note 1, Appendix, *infra.*

SPECIFICATION OF ERRORS.

1. The District Court erred in denying appellants judgment against the defendant Harold A. Berliner, appellee herein, in accordance with the prayers of

their respective amended complaints upon the ground that, as against said defendant, the amended complaints asserted "a ground upon which a refund was claimed" that was not encompassed in the refund claims filed by appellants.

SUMMARY OF ARGUMENT.

The Statute and the Regulations thereunder pertaining to the filing of refund claims require that the taxpayer in his refund claim set forth in detail each "ground upon which a refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof."

The District Court in holding that the amended complaints asserted as against the defendant Berliner, appellee herein, a "ground upon which a refund is claimed" that was not included in the claim filed with the Collector, assumed, without analysis of the question, that a Section 107 taxpayer's reliance upon the forgiveness provisions of the Current Tax Payments Act constituted, within the meaning of the Regulations, a "ground" separate and distinct from the taxpayer's basic right to avail himself of the benefits of the section. This assumption is erroneous. Upon analysis, it is shown that the application of the forgiveness feature is not a "ground upon which a refund is claimed"; it merely relates to the computation of a taxpayer's liability and is similar to the application of a tax rate. Accordingly, the omission of the

forgiveness feature in the refund claims does not affect their conformity to the requirements of the Regulations.

The right of appellants to compute their tax liabilities under Section 107a was the sole ground upon which their respective recoveries against *both* defendants were based. That ground and all facts in support thereof including all of the data necessary to the computation of appellants' 1943 tax liabilities and total overpayments were set forth in detail in the refund claims; accordingly the claims were no less sufficient as against the defendant Berliner than they were as against the defendant Smyth.

Because the District Court misconstrued a taxpayer's reliance of the forgiveness feature as a "ground" for refund within the meaning of the statute and regulations, the Court mistakenly relied upon the decisions dealing with substantive variances between refund claims and complaints. Since the application of the forgiveness feature merely relates to the computation of the amount of the refund, this case comes within the rationale of the decisions which hold that the correct statement of the amount in a refund claim is not material to its sufficiency.

ARGUMENT.

1. THE APPLICABLE STATUTE AND REGULATIONS. THE MEANING OF THE TERM "GROUND" AS USED IN THE REGULATIONS.

Section 3772(a)(1) of the Internal Revenue Code (26 USC Section 3772(a)(1)) provides that "no suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected * * *, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner, according to the provisions of law in that regard, and regulations of the Secretary established in pursuance thereof."

The pertinent regulations (Regulations Section 29.322-3) in force on December 31, 1948, the date of the filing of the refund claims involved herein, provide that "Claims by the taxpayer for the refunding of taxes, interest, penalties and additions to tax erroneously or illegally collected shall be made on Form 843" and that:

> "The claim must set forth in detail and under oath each *ground* upon which a refund is claimed, and *facts* sufficient to apprise the Commissioner of the *exact basis* thereof * * *. A claim which does not comply with this paragraph will not be considered for any purpose as a claim for refund." (Emphasis supplied.)

The administrative rules relating to refund claim hereinabove quoted, set forth a *dual* requirement, to-wit, a statement of each "*ground* upon which a re-

fund is claimed" and a statement of "*facts* sufficient to apprise the Commissioner of the exact basis thereof". Is "the exact basis thereof" the factual basis of "the claim" or of "the ground" relied upon? Since in the context of the regulation, the noun "ground" more immediately precedes the term "thereof", it must be considered, under normal rules of syntax, that the statement of facts called for by the regulations is that in support of the particular "ground" relied upon, rather than a statement of facts in support of the "claim" as a whole. The foregoing interpretation was adopted by this Court in *Rogan v. Ferry* (CCA-9; 1946), 154 F. (2d) 974, 977, 34 AFTR 1167-1170. The interpretation is all the more reasonable in view of the obvious incongruity of requiring a *separate* statement of the several grounds, each of which may be supportable by a different set of facts and yet permitting a single statement of facts in support of the claim as a whole. It follows that, as contemplated by the regulations, a ground assertable in a refund claim and the supporting statement of *facts* constituting the exact basis thereof are linked together as correlative concepts much the same way as a legal conclusion and the supporting ultimate facts. Viewed in this light, the term ground simply means the legal position upon which the refund claim rests, a usage which is in full accord with the dictionary meaning of the term.[1]

---

[1]The term is defined as "*a position to be maintained;* a point of view; opinion; belief".

Webster's New International Dictionary, 2d ed. (1952), p. 1106.

The District Court based its decision upon the rule that a taxpayer is not permitted to urge before the Court a "ground" not presented in the refund claim filed with the Bureau of Internal Revenue. (Memorandum Opinion, R. 66-68.) The Court below held that the amended complaints asserted a "ground upon which a refund is claimed" that was not included in appellants' refund claims, to-wit, appellants' reliance upon the "forgiveness" provisions of Section 6 of the Current Tax Payments Act of 1943. Said the District Court after reviewing the contents of the refund claims (R. 61):

> "The above constituted the only 'assignments of error' contained in the plaintiffs' claims for refund filed with the Collector. There is in those assignments not the slightest intimation, either of fact or of law, that the taxpayer was relying upon the 'forgiveness' provisions of Section 6 of the Current Tax Payment Act of 1943."

Obviously, not *any* omission of information in a refund claim is a violation of the regulations. To be fatal, the omission must be that of a *"ground"* for refund or of a *fact* which is part of the "exact basis thereof". Unfortunately the District Court simply *assumed* the point at issue, namely, that a taxpayer's reliance on the forgiveness provisions of Section 6 of the Current Tax Payments Act constituted "a ground upon which a refund is claimed" within the meaning of the regulations quoted. The Court never analyzed, indeed, it never even adverted to, the question. Therein, as will be shown, lies the lower Court's funda-

mental error. But, before proceeding with the analysis of the question we propose to review the contents of the refund claims in the light of the administrative requirements.

---

2. TESTING THE REFUND CLAIMS AGAINST THE REQUIREMENTS SET FORTH IN THE REGULATIONS.

To begin with, the claims were filed under oath on Form 843. The sole "ground upon which a refund was claimed" was appellants' asserted right to compute their 1943 tax liabilities in accordance with the provisions of Section 107(a) as set forth on their 1943 tax returns. This ground was asserted in several different ways. First, the deficiencies assessed pursuant to the Revenue Agent's Report of July 5, 1945 and the Conference Statement of February 25, 1947 (which Report and Statement were incorporated by reference) were claimed to be erroneous, thus contesting the holdings of the report and statement that George French, Jr. was an employee of the Oranges Brothers Construction Department and that the taxpayers were not entitled to the benefits of Section 107(a).[2]

---

[2]The portion of the refund claim referred to reads as follows:

"The claimant was assessed in error deficiencies in income and victory taxes for the taxable period shown above, which were paid in full on November 26, 1946 and June 5, 1947 on the basis of a report of internal revenue agent Robert L. Driscoll dated July 5, 1945 and a conference statement under the symbols 'IRA:Conf./HVH' issued by the office of the internal revenue agent in charge at San Francisco, California under date of February 25, 1947, which report and statement are incorporated herein by reference. The whole amount of the deficiencies $28,143.10 is claimed for refund with the interest paid thereon $4,575.49, together with the interest on the total overpayment claimed for refund according to law."

Secondly,[3] each of the taxpayers asserted "specifically as a basis for the refund claimed herewith" that his or her 1943 tax return truly and correctly reflected his or her tax liability, thereby adopting and incorporating in the claim the detailed computations of the tax liability under Section 107(a) as set forth in Schedule M of said return. Thirdly, the taxpayers assigned as errors underlying the deficiencies assessed pursuant to Revenue Agent's Report and Conference Statement the following:

(1) The denial to appellants of the right to apply the provisions of Section 107(a) in the computation of their respective tax liabilities for 1943; and

(2) The treatment of the taxpayer-husband (appellant George French, Jr.) as a partner of the Oranges Brothers Construction Department

---

[3]The portion of the refund claim hereinafter referred to reads as follows:

"The claimant claims specifically as a basis for the refund claimed herewith that his Form 1040 income and victory tax return for the calendar year 1943, showing a total income and victory tax liability of $69,150.12 and his amended Form 1040 income tax return for the calendar year 1942 were in all respects true and correct returns of his taxable income and victory taxes for those years, and that the assessments of deficiencies on the said return for the calendar year 1943 were, with reference to the report and statement described above and incorporated herein by reference, based on the following errors:

(1) The disallowance of the application of the provisions of section 107, Internal Revenue Code, in limitation of his income and victory tax liability on compensation for services received in 1943 for services during and for a period of more than 36 months, as computed in his said return for 1943;

(2) The computation of his income from services during the years 1942 and 1943 on the theory that, and as if he had been a member of a partnership, Oranges Brothers Construction Division; and * * *"

for the purpose of computing his income for the years 1942 and 1943.

Parenthetically, it might be pointed out that, while perhaps presented as parallel errors, the first assignment of error is but a legal conclusion deriving from the second error which is in the nature of an erroneous finding of fact. But be that as it may, the refund claims apprised the Commissioner of Internal Revenue, *in full detail,* of the following:

(1) the "ground" or legal position upon which the refund was claimed, to wit, that contrary to the Commissioner's *holding,* the taxpayers were entitled to avail themselves of the benefits of Section 107(a) (through the first assignment of error above referred to, the denial of the validity of the deficiency assessments, the denial of the findings and holdings contained in the Revenue Agent's Report and Conference Statement, and through the adoption of the 1943 tax returns as correctly reflecting the taxpayers' liabilities);

(2) *the facts* "sufficient to apprise the Comsioner of the exact basis" of the "ground" relied upon, to-wit:

a. That, contrary to the Commissioner's *finding,* George French, Jr. was an employee rather than a partner of the firm, Oranges Brothers Construction Department (through the second assignment of error and the denial of the findings and holdings contained in the Revenue Agent's Report and Conference Statement).

b. by referring to, and adopting, the 1943 tax returns, and Schedule M included therein, the factual showing necessary to bring a taxpayer within the purview of Section 107(a), to wit, the period over which the personal services of George French, Jr. extended, the total compensation received, the dates of receipt and compliance with the requirement that more than 80 per cent of the compensation was received in the taxable year 1943. (See, Finding No. 8, R. 75-76; Schedule M, Plaintiff's Exhibit 6, 1943 income tax returns of appellants.)

(3) by referring to, and adopting the 1943 tax returns and Schedule M included therein, *every single datum* necessary to the computation of the taxpayer's respective tax liabilities under Section 107(a) as called for by Schedule M, specifically the proper allocation of the income under Section 107(a) over the years 1938 to 1943 and the computation of the tax liabilities on the income allocated to the several years including the forgiveness year 1942 albeit that for that year the 75 per cent portion of the tax forgiven was not subtracted. (See, Findings Nos. 8 and 9, R. 75-76; Schedule M, Plaintiffs' Exhibit 6, 1943 income tax returns of Appellants.)

The recoveries sought in the amended complaints whether against the defendant Smyth or the defendant Berliner, both necessarily proceeded upon the same ground, to-wit, appellants' right to the benefits

of Section 107(a) for if appellants had no such right they had no cause of action against either of the defendants. On the other hand, if appellants did qualify for the relief provision, they actually overpaid their taxes by the excess of the amounts paid to any and all Collectors over their liabilities computed under Section 107(a). The form provided by the Treasury Department for refund claims, Form 843, nor the Regulations require a taxpayer to specify the amounts paid to several Collectors, respectively. The quoted regulations provide that "claims for refunding of taxes * * * erroneously or illegally collected shall be made on Form 843". In other words, the claim on Form 843 is one for the *total taxes* erroneously or illegally collected, being the excess of the actual payments over the tax liability as computed upon the statement of grounds and facts set forth in the claims. Whether such excess was paid to one collector or the other is immaterial. Thus, the ultimate measure of recovery, as against either of the Collectors was appellants' *correct* tax liability under Section 107(a) which controlled the amount of "erroneously or illegally collected taxes".

As above indicated, the refund claims duly set forth the ground of recovery, the supporting statement of facts, and all details necessary to the computation of taxpayers' correct tax liability under Section 107(a). The failure to subtract the forgiven portion of the 1942 tax is not the omission of a datum upon which a computation is based but a failure to *apply* a computational step to the data at hand. But, that aside,

since the contents of the refund claims were found sufficient to sustain the recoveries against the defendant Smyth, there is no foundation under the regulations for declaring them defective as against the defendant Berliner for the recovery sought against him of taxes "erroneously or illegally paid" was based upon the same *ground* and the *same measure,* to-wit, appellants' correct tax liability computed under Section 107(a).

---

3. **WHERE A TAXPAYER CLAIMS THE BENEFITS OF SECTION 107(a), I.R.C., HIS RELIANCE ON THE FORGIVENESS PROVISIONS OF SECTION 6 OF THE CURRENT TAX PAYMENTS ACT IS NOT A SEPARATE "GROUND UPON WHICH A REFUND IS CLAIMED" WITHIN THE MEANING AND THE POLICY OF THE STATUTE AND THE REGULATIONS.**

Under the decision of the District Court which has now become final, the refund claims set forth a sufficient statement of both the ground (or grounds) and the factual basis for the recoveries against the defendant Smyth. The portion of the judgment appealed from is therefore sustainable only upon the theory that the ground of recovery urged against the defendant Berliner is separate from, and totally *independent* of, the ground of recovery underlying the judgment against the defendant Smyth. The sole ground of recovery against the defendant Smyth was appellants' right to compute their 1943 tax liabilities in accordance with the provisions of Section 107(a). Accordingly, the question arises as to whether a Section 107 taxpayer's right to avail himself of the for-

giveness provisions of the Current Tax Payments Act can be divorced as a separate "ground" or "legal position" from the basic right to the benefits of the section. In other words, could the Commissioner recognize a taxpayer's right to compute his tax liability under Section 107(a) and yet validly deny him the right to avail himself of the forgiveness feature in computing the "hypothetical tax" on income allocable under Section 107(a) to a forgiveness year? The answer of the Tax Court in *William F. Knox, supra,* is in the negative and the Commissioner has accepted the answer by his acquiescence in that decision.

After carefully reviewing the legislative history and purpose of the Act, the Tax Court, in the *Knox* case, concluded that the Current Tax Payments Act was legislation of *universal application,* embracing all taxpayers, including those computing their liabilities under Section 107; it was therefore *mandatory* in a Section 107 case, for the Commissioner to give effect to the forgiveness provisions in the computation of the tax under Section 107. See: Appendix Note 2.

Moreover, to consider the applicability of the forgiveness feature as a separate "ground" for refund does violence to the use of the term in the regulations. Assuming that a taxpayer's reliance on the forgiveness provisions as to the year 1942 *were* a ground separate and apart from his right to relief under Section 107(a), what would the correlative statement of facts supporting such ground be? Obviously, *any* taxpayer computing his 1942 tax liability

whether under Section 107(a) or otherwise, would be entitled to the same benefit. As applied to such a "ground" the requirement of a supporting statement of fact is *meaningless.* In short, such a "ground" does not fit the "correlative concept" of ground and statement of facts contemplated by the administrative rules and hence is not a "ground upon which a refund is claimed" within the meaning of the regulations.

Finally, the Tax Court clearly characterized the forgiveness feature of the Current Tax Payments Act as one dealing with *rates,* saying:

> "As to the forgiven year, the Act did, in fact, deal with rates, since its effect was to establish as the rate of tax only the unforgiven portion."

The reduction of the tax under the forgiveness feature is indeed analogous to the reduction of the combined tentative normal tax and tentative surtax by the applicable percentage as provided in Section 12 of the Internal Revenue Code, whereby the combined normal tax and surtax was computed for taxable years beginning after December, 1945 and before October 1, 1950. Section 101, Revenue Act of 1945; Section 101, Revenue Act of 1948. Section 12 of the Code is clearly one dealing with tax rates.

Assume the facts of this case with but one change, namely, that the overstatement of the tax on the 1943 returns resulted from the application of the wrong tax rate to the year 1942 rather than from the failure to apply the forgiveness feature, and that the

error was not discovered until after trial and was sought to be corrected by the filing of amended complaints. Would the Commissioner or the Collector seriously contend that the taxpayer had asserted in the amended complaints a new "ground" of recovery, or that the taxpayers' failure to call the Commissioner's attention to the correct tax rate in the refund claims was fatal to their recovery of the full overpayments?

It would hardly be suggested that a computational error, such as the application of the wrong tax rate, should be assimilated to the substantive ground of recovery upon which the claim is based. The Commissioner of Internal Revenue depends upon the taxpayer apprising him of the ground of recovery and the factual basis thereof so that he may be properly guided in his investigation of the claim and have an opportunity to reconsider or correct prior action taken by his office. That, indeed, is the underlying policy of the requirements imposed by the statute and the regulations. *W. C. Tucker v. Alexander* (1926), 15 F. (2d) 356, 357; 6 AFTR 6338, 6339, reversed on another point (1927), 275 U.S. 228, 6 AFTR 7070, quoted in GCM 1020, *C. B. June,* 1927, p. 119; *Rogan v. Ferry* (CCA-9, 1946), 154 F. (2d) 974, 977, 34 AFTR 1167, 1170. See: Appendix, Note 3. *Electric Storage Battery Co. v. McCaughan* (D.C. 1931), 54 AFTR 814, 10 AFTR 909. Obviously, the Commissioner requires no aid from the taxpayer to be informed as to the applicable provisions of law govern-

ing the computation of a taxpayer's liability in a given situation such as rate provisions, including the forgiveness provisions of the Current Tax Payment Act. Accordingly a taxpayer's reliance on such provisions does not come within the policy of the statute and regulations.

---

4. THE DECISIONS CITED BY THE DISTRICT COURT REQUIRING STRICT COMPLIANCE WITH THE REFUND STATUTES AND REGULATIONS HAVE NO APPLICATION TO THIS CASE.

In its Memorandum Opinion (R. 62-66) the District Court quoted at length from *Nicholl v. United States* (1869), 74 U.S. 122, *United States v. Felt & Tarrant Co.* (1931), 283 U.S. 269, and *Maas & Waldstein & Co. v. United States* (1931), 283 U.S. 583, 9 AFTR 1465, to show that the filing of a refund claim setting forth definite grounds for the refund is a condition precedent to suit and that *strict* compliance with the condition was essential both under the refund statutes and the regulations. The principle is, of course, recognized by appellants. It was clearly dispositive of the issue in the cases cited, for in those cases *no refund claim had been filed or no specific ground had been stated in the claim.* The principle relied upon by the District Court is, however, no answer to the basic issue herein, that is, as to whether the refund claims filed by appellants failed to state an essential ground of refund as against the defendant Berliner. Nor do this Court's decisions in *Vica Co. v. Commissioner* (CCA-9, 1947), 159 F. (2d) 148, 150, 35

AFTR 647, *cert. denied* 331 U.S. 833 (1947), and in *Rogan v. Ferry* (CCA-9, 1946), 154 F. (2d) 974, 34 AFTR 1167, lend support to the District Court's holding. These decisions essentially restate the rule expressed in the regulations.

In the case of *Rogan v. Ferry, supra,* this Court, incidentally, takes what might be called a liberal view of the statutory and administrative requirements relating to refund claims, stressing as their main purpose the function to apprise the Commissioner of the *facts* so as to guide his investigation rather than to lay "traps for the unwary".

---

5. SIMILARLY, THE DECISIONS CITED BY THE DISTRICT COURT DEALING WITH A VARIANCE BETWEEN THE GROUNDS URGED IN THE REFUND CLAIM AND THOSE URGED IN THE SUIT HAVE NO APPLICATION HEREIN.

The District Court invoked the well settled rule that a taxpayer cannot urge before the Court a ground for refund not specified in his refund claim, citing *Real Estate-Land Title & Trust Co. v. United States,* 309 U.S. 13, 23 AFTR 816, and *Nemours Corporation v. United States* (CCA-3, 1951), 188 F. (2d) 745, 40 AFTR 485, *cert.* den. (1951) 342 U.S. 834. In these cases, the taxpayer urged one substantive ground of recovery in the refund claims and in the suit shifted to another ground based upon a different section of the Internal Revenue Code. The lower Court's error in citing cases dealing with substantive variances is, of course, attributable to his erroneous assumption

that a Section 107 taxpayer's reliance on the forgiveness feature constitutes a separate ground for refund.

---

6. **THE DISTRICT COURT MISCONSTRUED THE FAILURE TO APPLY THE FORGIVENESS FEATURE AS GOING TO THE SUBSTANCE OF THE CLAIM RATHER THAN TO THE COMPUTATION OF THE AMOUNT. THIS CASE COMES WITHIN THE RATIONALE OF THE DECISIONS HOLDING THAT THE CORRECT COMPUTATION OF THE AMOUNT IN THE REFUND CLAIM IS NOT ESSENTIAL TO THE SUFFICIENCY OF THE CLAIM.**

Where the income of a taxpayer qualifying for the benefits of Section 107 is apportioned over a period of years which includes the forgiveness year 1942 the hypothetical tax liability computed for such year is subject to reduction by 75 per cent under the rule of the *Knox* case. The computation of the tax for the forgiveness year is one of the phases in the computation of the aggregate tax liability under Section 107(a) which is the sum of the tax liabilities computed for the several years over which the income has been allocated. Thus the application of the forgiveness feature is but one step—and a rather mechanical step at that—*in the computation of the amount* of a Section 107 taxpayer's liability or refund which is measured by the liability.

The Courts have held that a refund claim is not defective merely because it understates *the amount* sought to be recovered in the suit. Thus, in the case of *Electric Storage Battery Co. v. McCaughan* (D.C. Penn., 1931), 54 F. (2d) 814, 10 AFTR 999, the plain-

tiff was allowed to recover the sum of $825,151.52 for taxes illegally collected, although the amount specified in the refund claim was only $148,381.05. Said the Court:

> "I am satisfied that the claim for refund in this case was a sufficient requirement of the statute as to the amount of $148,381.05 as well as to the larger amount of $825,151.52. * * * Under a claim for refund which specifies a certain amount 'or such greater amount as is legally refundable', the plaintiff may sue for a larger amount than is set forth in the complaint, *provided the entire suit proceeds on the grounds set forth in the claim for refund. The purpose of the statutory requirement, to give the Commissioner full opportunity to reconsider and modify, if he so desires, the rulings of his office, has been accomplished. The exact amount claimed is a matter of little importance.*" (Emphasis added.)

In *International Curtis Marine Turbine Co. v. United States* (1932), 74 Ct. Cl. 132, 56 F. (2d) 708, 10 AFTR 1395, the plaintiff corporation had recovered in a suit the amount stated in its refund claim to be due it on account of the Commissioner's refusal to allow any depreciation deduction in respect of certain properties. Thereafter, the plaintiff filed a refund claim and suit for a further amount alleged to be due on account of additional depreciation allowable in respect to the properties in question. The Court held the second suit barred under the doctrine of *res adjudicata* and the rule against splitting a single cause of action, explaining that the additional

amount was recoverable in the first suit and upon the first claim. Said the Court (56 F. (2d) 711, 10 AFTR 1398):

> "In order to make a refund of any amount for depreciation, a computation of the tax after the proper allowance had been made therefor must first be made, and without such a computation the amount of the refund could neither be determined nor paid. The Commissioner could, as he did, refuse to allow any depreciation whatever, but this was merely denying plaintiff's claim at the outset and refusing to do what plaintiff asked to have done. The nature of plaintiff's claim was one for deduction on account of depreciation coupled with the claim for a refund on the basis of such an allowance."

To the same effect are *F. W. Woolworth Co. v. United States* (CCA-2, 1937), 91 F. (2d) 973, 20 AFTR 205, *cert. den.* 1-7-38, reversing on another point, 15 F. Supp. 679, 18 AFTR 310; *Dalton Foundries v. United States* (Ct. Cl., 1932), 56 F. (2d) 483, 487, 10 AFTR 1335, 1339; *Dixie Margarine Co. v. United States* (Ct. Cl., 1935), 12 F. Supp. 543, 16 AFTR 1156, *cert. den.* 3-2-36.

In the case of *Osborne v. United States* (Ct. Cl., 1931), 54 F. (2d) 824, 10 AFTR 1000, plaintiff's income from the sale of certain property depended upon the March 1, 1913 value of the property in question. The plaintiff in his income tax return computed his income upon the basis of a value of $100,000.00. The Commissioner of Internal Revenue assessed a defi-

ciency by reducing the value to $50,030.00. The plaintiff filed a claim for refund, reasserting a value of $100,000. In the suit plaintiff proved a value of $110,100.00 and sought a refund accordingly. The Collector of Internal Revenue sought to limit the plaintiff's refund to that resulting from the valuation of $100,000.00 set forth in the claim for refund. In holding for the plaintiff, the Court said as follows:

> "Nor is the taxpayer limited in a suit to recover an overpayment computed upon a value which may have been stated in the return and repeated in the claim for refund where the Commissioner of Internal Revenue refuses to allow the claim and determines a smaller value. Neither the statute nor the regulations with reference to a claim for refund require that figures stated therein in support of the claim shall be set forth with absolute accuracy. It would be going far beyond the purpose and intent of the statute and the regulations relating to claims for refund and sets as the basis thereof the March 1st, 1913 value of certain property he is thereafter barred from recovering a refund in excess of the amount resulting from the value which may be set forth in the claim in support of the grounds thereof."

On its facts, the instant case closely parallels the *Osborne* case. As here, so in the *Osborne* case, the taxpayers were assessed a deficiency because the Commissioner rejected the basis upon which the return was filed. The taxpayers filed refund claims merely reaffirming the returns and demanding a refund of the deficiencies only. The Commissioner rejected the

claim. In the suit the taxpayers asserted, in effect, an overstatement of their liability on the returns, demanding a recovery in excess of the deficiencies and of the amounts set forth in the claims. The Court rejected the Government's attempt to limit the taxpayers to the recovery sought in the refund claims.[4]

In *Keneipp v. United States* (App.D.C., 1950), 184 F. (2d) 263, 39 AFTR 1039, *cert. den.,* the taxpayers reported a long-term capital gain from a condemnation award in their 1941 return. The Commissioner assessed a deficiency of $857.96 (which was paid) upon the ground that a portion of the gain was ordinary income. The refund claim, in broad terms, took exception to the Commissioner's theory and assumptions as entirely "unwarranted by the facts" but was accom-

---

[4]It is true in the above cases where the taxpayer recovered a larger amount than specified in his claim for refund, the official Form 843 called for the "amount to be refunded *or such greater amount as is legally refundable*". The pertinent cases hold that "For the period named in the refund claim the taxpayer may recover the amount of the payment proved by him to have been made irrespective of the amount set forth in the refund claim. *Dixie Margarine Co. v. United States, supra.* While the italicized clause has since been eliminated from the official Form 843, this does not mean that the rule permitting a taxpayer to recover the amount proved rather than that specified in the claim has changed. First, this would be in contradiction to the reasoning of the Courts which hold that the purpose of the refund claim is to advise the Commissioner of the grounds and facts relied upon by the taxpayer, the amount of the refund being a matter of little importance. Secondly, the Government could hardly assume that by eliminating the clause, "*or such greater amount as is legally refundable,*" it changed the rule in regard to the amount recoverable upon refund claims. Under the statute (Section 3772(a)(1) of the Internal Revenue Code) changes in requirements for filing refund claims can be effected only through the Regulations and not by the deletion of words in a printed form designed to "lay a trap for the unwary".

panied by a statement containing many details regarding the condemned property. Negotiations between the taxpayer and the Bureau in 1945 relative to the refund claim indicated that the Bureau was aware that the taxpayers contested the entire treatment of the award claiming that no part of it was income in the year 1941. A second refund claim which was, admittedly, untimely, was filed setting forth the latter position. The refund claims, having been rejected, the taxpayers filed suit, demanding a refund of the entire tax paid on the 1941 return, in accordance with the theory of the second refund claim. The Court of Appeals held that the first refund claim was sufficiently broad and definite to raise the question as to the entire treatment of the award, notwithstanding the fact that the amount therein claimed was based only upon contesting the Commissioner's treatment of a portion of the award. Accordingly, the Court concluded that the untimeliness of the second claim was immaterial as the first claim was sufficient to support the larger recovery sought in the complaints.

By analogy to the *Keneipp* case, appellants' refund claims were broad and definite enough to advise the Commissioner that the *entire* application of Section 107(a) to the appellants' situation was placed in issue including the subordinate question of the applicability of the forgiveness feature as to which the Commissioner had admitted that his regulations were contrary to the law (Section 6, Current Tax Payments Act)

after the filing of the refund claims. Hence the claims constitute a sufficient basis for the amended complaints and no amendment to the claims was necessary.

The District Court, in the instant case, agreed with the proposition that errors in the computation of the amount of the refund did not impair the sufficiency of a refund claim. The Court rejected, however, and indeed ridiculed appellants' contention that the omission of the forgiveness feature amounted to no more than an error of computation as distinct from a ground of refund. "The short answer to this argument," the Court said, "is that Professor Einstein himself, *unless he had known of the existence of Section 6 of the Current Tax Payments Act of 1943,* could not have 'computed' the plaintiffs' income tax returns so as to have invoked the 'forgiveness' provisions of that statute!" (Emphasis supplied.) [Memorandum Opinion, R. 69.]

But what does the "short answer" prove? Knowledge of the *rules of computation* is of course essential to any person's ability to calculate a desired quantity, be it a quantity of mathematical physics or a liability under the tax law. It makes no difference whether that person be Professor Einstein or the Commissioner of Internal Revenue. According to the Tax Court, an expert body on questions of tax law, the forgiveness provision of Section 6 of the Act is no more than a *rule of computation,* similar to the application of a tax rate. *William F. Knox, supra,* in

which the Commissioner promptly acquiesced. The crux of the matter is that whatever the statutory function of a refund claim may be, its purpose, most certainly, is not to instruct the Commissioner as to applicable tax rates or other rules of law governing the computation of tax liabilities in a given situation. These the Commissioner is presumed to know. Hence, the omission of such information from refund claims is utterly immaterial to their sufficiency.

CONCLUSION.

For the foregoing reasons, the portion of the judgment of the District Court from which this appeal is taken should be reversed and remanded to the District Court with directions that the District Court enter judgment for appellants and against the defendant Harold A. Berliner, in accordance with the respective prayers of the amended complaints.

Dated, San Francisco, California,
August 28, 1953.

CLYDE C. SHERWOOD,
Attorney for Appellants.

JOHN V. LEWIS,
M. L. LIEBERMAN,
Of Counsel.

(Appendix Follows.)

Appendix.

Appendix

NOTE 1. STATUTE AND REGULATIONS INVOLVED. The applicable statute relating to suits for tax refunds is Section 3772 of the Internal Revenue Code, 26 USC, Section 3772, which reads as follows:

> "(a) Limitation s
>
> "(1) Claim. No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof."

The regulations relating to "Claims for Refund by Taxpayers" are found in Regulations 111, Section 29.322-3, Code of Federal Regulations, 1943, Cumulative Supp., Title 26, pp. 6443-6444, as Amended in 1944 Sup., *id.*, pp. 1989-1990. Regulations 111, Section 29.322-3, in force on December 28, 1948, the date of the filing of the refund claims involved herein, read in part as follows:

> "REG. 111, SEC. 29.322-3 (As amended by T. D. 5325, Jan. 8, 1944, T. D. 5333, February 28, 1944 and T. D. 5425, Dec. 29, 1944). *Claims for*

refund by taxpayers.—Claims by the taxpayer for the refunding of taxes, interest, penalties and additions to tax erroneously or illegally collected shall be made on Form 843, or on Form 1040 or Form 1040 A, or by the use of Form W-2 (Rev.), as provided in this section, and should be filed with the collector of internal revenue. A separate claim shall be made for each taxable year or period.

No refund or credit will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim therefor except upon one or more of the grounds set forth in a claim filed prior to the expiration of such period. The claim must set forth in detail and under oath each *ground* upon which a refund is claimed, and *facts* sufficient to apprise the Commissioner of the *exact basis thereof.* * * * A claim which does not comply with this paragraph will not be considered for any purpose as a claim for refund."

NOTE 2. In *William F. Knox* (1943) 10 T. C. 550 the Tax Court stated as follows (at pp. 556-557):

"The Current Tax Payment Act, on the other hand, was legislation of general application dealing not with a restricted class, such as non-resident aliens, but with all taxpayers; no question of status in one year or another was involved. As to the forgiven year, the act did in fact, deal with rates, since its effect was to establish as the rate of tax only the unforgiven portion. The doctrine of the *Stallforth* case has, we think, no bearing upon such a question as to the present, where the relationship of section 107 to other

legislation of universal application is the central issue.

We accordingly view respondent's refusal to permit petitioner to apply the provisions of the Current Tax Payment Act to the computation of his tax under section 107 as unwarranted. The deficiency is disapproved."

NOTE 3. G. C. M. 1020, C. B. June, 1927, p. 119, reads in part as follows:

"As stated by the Circuit Court of Appeals of the Fifth Circuit in the case of W. C. Tucker v. Alexander [15 F. (2d) 356, 6 AFTR 6338, reversed on another point, 275 U. S. 228, 6 AFTR 7070] * * * the evident purposes and objects of the statute in requiring that a claim be filed 'are to afford the Commissioner an opportunity to correct errors made by his office and to spare the parties and the courts the burden of litigation in respect thereto. Unless the claimant were required to present to the Commissioner all the grounds upon which he relies for refund, the above purposes and objects would be partially or entirely defeated.' "

This Court, too, stressed as the purpose of the statutory and administrative requirements, the function of the claim to apprise the Commissioner of the factual bases of the taxpayer's claims. Thus, the Court stated in *Rogan v. Ferry* (CCA-9, 1946), 154 F. (2d) 974, 977, 34 AFTR 1167, 1170, as follows:

"The statute and regulations governing claims are devised for the convenience of government officials in passing on claims for refunds and in

preparing for trial and they are not 'traps for the unwary.'

The principal requirement of these regulations and the statute is that the Commissioner be apprised, by means of the claim (which includes any supporting or amending documents such as a protest, affidavits or other supplements), of the exact basis of each ground on which a refund is claimed so that he may investigate the facts relative to these grounds and make his decision accordingly."

No. 13,729

IN THE

United States Court of Appeals

For the Ninth Circuit

GEORGE FRENCH, JR., and MARY E. FRENCH,

Appellants,

vs.

HAROLD A. BERLINER, Former Collector of Internal Revenue,

Appellee.

On Appeals from the United States District Court for the Northern District of California.

BRIEF FOR THE APPELLEE.

H. BRIAN HOLLAND,
Assistant Attorney General.

ELLIS N. SLACK,

LOUISE FOSTER,
Special Assistants to the Attorney General.

LLOYD H. BURKE,
United States Attorney.

CHARLES ELMER COLLETT,

WILLIAM H. LALLY,
Assistant United States Attorneys.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Cases

Statutes

Miscellaneous

No. 13,729

IN THE

United States Court of Appeals

For the Ninth Circuit

GEORGE FRENCH, JR., and MARY E. FRENCH,

Appellants,

vs.

HAROLD A. BERLINER, Former Collector of Internal Revenue,

Appellee.

On Appeals from the United States District Court for the Northern District of California.

BRIEF FOR THE APPELLEE.

OPINION BELOW.

The opinion of the District Court (R. 56-70) is reported at 110 F. Supp. 795.

JURISDICTION.

This appeal involves income and victory tax for 1943 in the amount of $19,611.21, with interest, as to each taxpayer. (R. 38, 44.) A portion of the total tax

paid by each taxpayer for 1943 was paid to Collector James G. Smyth and a portion was paid to Collector Harold A. Berliner, but the original complaints (R. 3-18) sought to recover only from the former and were based on claims for refund which were filed on December 28, 1948, and which asserted taxes and interest due in the approximate amount of $32,700. (R. 7-10, 15-18.) These claims were rejected by the Commissioner on November 7, 1949 (R. 80), and suits were filed against Collector Smyth on December 9, 1949. (R. 10, 18.) After trial, judgment was rendered on October 4, 1950, in favor of Collector Smyth. (R. 25-27.) But a motion for a new trial was duly granted (R. 27-29) and the District Court also granted the taxpayers' motion to file amended complaints and to join Collector Berliner as a party defendant. (R. 30-33.) The amended complaints alleged that taxes for each taxpayer had been overpaid in 1943 in the amount of $52,329.79 and that of this amount $19,-611.20 had been paid to Berliner. (R. 34-44.) The cases were submitted to the District Court without a jury and judgment was entered on November 4, 1952, against Collector Smyth in favor of each taxpayer in the approximate sum of $32,500 with interest. (R. 82-84.) The District Court had jurisdiction of these suits under 28 U.S.C., Section 1340. Notice of appeal was filed January 2, 1953. (R. 85.) Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

QUESTION PRESENTED.

Whether the District Court was in error in holding that the amended complaints assert a ground for recovering a refund from Collector Berliner, appellee here, which was not included in the claims for refund.

STATUTES AND REGULATIONS INVOLVED.

The pertinent provisions of the statutes and Regulations involved are set forth in the Appendix, *infra.*

STATEMENT.

These suits seek to recover income taxes alleged to have been illegally assessed and collected from the taxpayers for the year 1943. The original complaints were filed only against Collector Smyth (who is not involved here) but, upon permission being given to the taxpayers, amended complaints were filed and Collector Berliner was then joined as a party defendant. Only the taxes paid to the latter are involved on this appeal.

The facts as found by the District Court are as follows (R. 72-81):

The taxpayers are residents of Stockton, California, and, being married all during the years 1938 through 1943, they reported their income on a community basis. They filed their income tax returns for 1943 with Collector Smyth and such returns, as well as their books, were kept on a cash basis. (R. 72-73.)

The taxpayer George French, Jr., made payments of income tax to Collector Berliner as follows (R. 73):

GEORGE FRENCH, JR.

Date of Payment	Amount
7-15-43	$29,451.94
9-15-43	26,219.78
12-15-43	13,701.94
1943 payment by employer of amount withheld from compensation	11,521.56
Total	$80,895.22
LESS: overpayment refunded	11,745.10
Total net payment equal to net liability per 1943 return	$69,150.12

Mrs. Mary E. French made payments of income tax to Collector Berliner on the same dates and in approximately the same amounts as those listed above for her husband. (See details, R. 73.)

No part of these payments has been refunded to the taxpayers. (R. 73.)

Taxpayer George French, Jr., received a total compensation of $429,196.69 for his personal services under his contract of employment with Oranges Brothers Construction Department. Of that sum, 4.85 per cent or $20,827.87 was received prior to January 1, 1943, and 95.15 per cent or $408,368.82 was received during 1943 on two different dates. (R. 75.)

Attached to each taxpayer's 1943 income tax return was a Schedule "M" showing various details including the allocation of the 1943 income over the period of services rendered by George French, Jr., from November 15, 1938, to May 31, 1943. On each Schedule "M" it was stated that the allocation was made in

accordance with the provisions of Section 107(a) of the Internal Revenue Code and is as follows (R. 75):[1]

1938	2	months	$ 15,063.87
1939	12	"	90,383.14
1940	12	"	90,383.14
1941	12	"	90,383.14
1942	12	"	90,383.11
1943	1	and 5 mos.	31,772.42
Total			$408,368.82

[1]Only the figures under the column marked "Total" are given above as such figures represent the allocation for both installments of compensation received by George French, Jr., in 1943.

Schedule "M" also indicated the amount of compensation actually received in the prior years including $15,727.87 for 1942. (For complete list see R. 76.) The income tax liability on the income allocated to the calendar year 1942 for the taxpayers was set out on Schedule "M" as follows (R. 76):

Year 1942		George French, Jr.		Mary E. French
Net income per amended return		$ 7,764.34		$ 7,764.33
Amount taxable per sec. 107(a)		45,191.55		45,191.56
Total for computation		$52,955.89		$52,955.89
Less:				
Personal exemption	$454.17		$745.83	
Credit for dependent	291.67	745.84		745.83
Surtax net income		$52,210.05		$52,210.06
Less: earned income credit		1,400.00		1,400.00
Balance subject to normal tax		$50,810.05		$50,810.06
Normal tax		$ 3,048.60		$ 3,048.60
Surtax		24,698.63		24,698.64
Total		$27,747.23		$27,747.24
Less income tax per item 17, p. 4		1,598.96		1,598.96
Balance tax at 1942 rate		$26,148.27		$26,148.28

The taxpayers did not claim forgiveness of 75 per cent of their income tax liability in accordance with Section 6 of the Current Tax Payment Act of 1943. (R. 77.)

After the taxpayers' returns for 1943 were audited, the agent who audited them made a report stating that George French, Jr., was a partner and not an employee of the Oranges Brothers Construction Department and so held that the taxpayers must compute their tax without reference to Section 107 (a) of the Internal Revenue Code. A protest was filed but a conference report also held that French was a partner and the Commissioner determined deficiencies against each taxpayer which were paid with interest to Collector Smyth. (R. 77-78.)

On December 28, 1948, the taxpayers filed timely claims for refund. (R. 78.) Each of these stated "specifically as a basis for the refund claimed" that the income tax returns for 1943, showing a total tax of $69,150.12, and the amended returns for 1942 "were in all respects true and correct returns" of the taxable income and taxes for those years (R. 79) and that the deficiencies for 1943 were based on the following errors (R. 79-80):

> (1) The disallowance of the application of the provisions of Section 107, Internal Revenue Code, in limitation of his income and victory tax liability on compensation for services received in 1943, for services during and for a period of more than 36 months, as computed in his said return for 1943:

> (2) The computation of his income from services during the years 1942 and 1943, on the theory that, and as if he had been a member of a partnership, Oranges Brothers Construction Division; and * * *

These claims for refund were disallowed by the Commissioner on November 7, 1949. (R. 80.)

The District Court concluded (R. 81-82) as to Collector Berliner, appellee here, that the amended complaint asserts a ground for recovery that is not included in the refund claims as follows (R. 82):

> A claim that plaintiffs are entitled to forgiveness of seventy-five per cent (75%) of the tax on income allocated to 1942, by virtue of Section 6 of the Current Tax Payment Act.

Therefore the District Court decided that the taxpayers cannot recover any sum against the appellee here and entered judgment in taxpayers' favor only for the amount of deficiencies and interest paid by them to Collector Smyth. (R. 82-84.)

SUMMARY OF ARGUMENT.

The District Court correctly held that the taxpayers are not entitled to recover any part of their 1943 taxes paid to Collector Berliner, appellee here. Taxpayers admit that no suit for recovery of taxes allegedly overpaid can be maintained until a refund claim has been duly filed and that such claim must set forth in detail each ground upon which a refund is claimed

and give facts sufficient to apprise the Commissioner of the exact basis thereof. Taxpayers also admit that their refund claims set forth only one ground for recovery and that the new allegations in their amended complaints include material not set forth in their claims. But they assert that such variance is not material. We cannot agree and the District Court did not agree either.

The taxpayers' sole purpose in filing their refund claims and in instituting their original suits against Collector Smyth was to recover deficiencies in taxes which they had paid for 1943. Such deficiencies were the result of a determination by the Commissioner that the taxpayer George French, Jr., was a member of a partnership and should be taxed on that basis. Thus the Commissioner held that the taxpayers were not permitted to allocate a portion of the compensation received in 1943 to prior years as provided in Section 107 of the Internal Revenue Code and as they had done in preparing their tax returns. The District Court however held that George French, Jr., was an employee, not a partner, and allowed taxpayers to recover the deficiencies and interest which had been paid to Collector Smyth. Such allowance also amounts to an approval of the taxpayers' 1943 tax returns as filed.

But it should be noted that nowhere in the claims for refund or in the original complaints against Collector Smyth are there any allegations by taxpayers that their method of applying Section 107 or in de-

termining the amount of their 1943 income or taxes was erroneous. Instead, they specifically stated in their claims that their returns were in all respects true and correct returns. Moreover, there was no reference in the claims to the Current Tax Payment Act of 1943 on which they now rely. Reference to that Act, as well as to the alleged errors in their returns, was first made in the amended complaints which also named Collector Berliner as a party. Thus it was not until these amended complaints were filed that the taxpayers sought to recover anything but the deficiencies they had paid to Smyth. In other words, it was not until the amended complaints were filed that the taxpayers sought to recover a portion of the 1943 taxes which they had reported on their tax returns and which they had paid to Berliner. The taxpayers are in error in contending that the new allegation which appears in the amended complaints do not present a new ground and that it merely refers to a mechanical step in the computation. Instead, the basis on which taxpayers necessarily rely for recovery here brings in a new issue, namely, the interpretation and application of two statutory provisions which were enacted for entirely different purposes. As the Commissioner was not apprised that the taxpayers were alleging any errors in the way Section 107 had been applied by them in preparing their 1943 returns and as the taxpayers did not rely on the Current Tax Payment Act of 1943 the taxpayers did not meet the requirements for their refund claims and should not recover.

As the many applicable cases show, the taxpayers who seek to recover from the Government are held to strict compliance with the law and long-approved Regulations.

ARGUMENT.

THE DISTRICT COURT CORRECTLY HELD THAT THE GROUND ON WHICH THE TAXPAYERS ARE SEEKING TAX REFUNDS HERE WAS NOT SET FORTH IN THEIR CLAIMS FOR REFUND AND THAT THEY ARE NOT ENTITLED TO RECOVER ANYTHING FROM THE APPELLEE.

The District Court held that no portion of the taxes paid by the taxpayers in 1943 to Collector Berliner, appellee here, could be recovered for the reason that the ground on which recovery was sought in the amended complaints was not set forth in the taxpayers' claims for refund. We submit that the District Court's decision correctly interprets the law and applies it to the facts of this case.

It has of course been repeatedly held that no suit for recovery of any taxes allegedly overpaid can be maintained until a claim for refund has been duly filed with the Commissioner "according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof". Section 3772(a) of the Internal Revenue Code (Appendix, *infra*). The long-approved Regulations provide that a claim must set forth in detail each ground upon which a refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof.

Section 29.322-3 of Treasury Regulations 111 (Appendix, *infra*). Taxpayers admit that they must meet these requirements. Consequently there is no question here that the statutory provision and the Regulations just referred to are applicable but the taxpayers contend that they have complied with the requirements.

However, in making such a contention, taxpayers also admit that their claims for refund state only one ground for recovery and apparently agree that such ground is actually different from the ground set out in their amended complaints and on which they seek recovery here. But they argue that this variance is not material and assert (Br. 25) that the omission of the forgiveness feature from their refund claims is not that "of a datum upon which a computation is based but a failure to *apply* a computational step to the data at hand". We cannot agree and neither did the District Court. The taxpayers' contention is based on one ground whereas their amended complaints rely on another ground. Thus there is a fatal variance between the two and they have also failed to note or comply with the strict language of many applicable cases.

A. Basis for the refund claims.

At the outset, we wish to point out that the claims for refund (R. 7-11, 15-18) show in unmistakable language that such claims were filed solely to recover the sums paid by each taxpayer as tax deficiencies for 1943. That this is so is shown not only by the state-

ment that recovery should be allowed because the deficiencies were erroneously assessed but also by statements indicating specifically that the taxpayers were seeking to recover nothing but the deficiencies and interest thereon. Thus, by the limiting terms which the taxpayers used in their claims it is clear that they did not intend to cover that portion of their 1943 taxes which they reported on their returns but are now seeking to recover from the appellee. Consequently, such portion of the 1943 tax was not included in setting forth the ground for their refund claims and no recovery should be allowed in excess of the deficiencies and interest thereon.

We are of course aware, as taxpayers point out (Br. 32-33), that Courts have sometimes allowed a taxpayer to recover an amount larger than that asserted in a refund claim but our objection is different. We are not contending that any recovery by the taxpayers here should be limited to the deficiencies and interest merely because that was the amount indicated in their claims. What we are asserting is that by limiting their claims to the deficiencies, the taxpayers were necessarily required to limit, and actually did limit, their ground for recovery to the facts and the law which are applicable to, and are the underlying cause of, the deficiencies. But such ground is different from that on which they have sought recovery in their amended complaints and on which they are seeking it here. In other words, the reason why the taxpayers considered the deficiencies erroneous and sought their

recovery is not the reason why they subsequently sought recovery of that portion of the 1943 tax which they voluntarily reported and paid but now want returned to them.

It is of course apparent from the record that the deficiencies referred to in the refund claims were entirely due to the Commissioner's determination that one of the taxpayers, George French, Jr., was a partner in Oranges Brothers Construction Department. Such determination means, as taxpayers know, that the Commissioner did not accept the taxpayers' statement on their 1943 returns as to the amount of their income for that year and the reason he did not do so is because such returns did not treat French as a partner. Thus the Commissioner, in making his determination, first computed the portion of the company's earnings which was available to French when treated as a partner, and then the Commissioner computed the tax on such partnership earnings. This resulted in the deficiencies which the taxpayers paid to Collector Smyth and which are covered by the claims for refund.

That our interpretation of the refund claims is correct is shown by the following excerpts from the claim filed on behalf of George French, Jr., which is in all material respects like that filed by his wife (R. 9-10):

> The claimant claims *specifically as a basis for the refund claimed herewith that his Form 1040 income and victory tax return for the calendar year 1943,* showing a total income and victory tax liability of $69,150.12, and his amended Form 1040

income tax return for the calendar year 1942, *were in all respects true and correct returns of his taxable income and victory taxes for those years,* and that the assessments of deficiencies on the said return for the calendar year 1943 were, with reference to the report and statement described above and incorporated herein by reference, *based on the following errors:*

(1) The disallowance of the application of the provisions of section 107, Internal Revenue Code, in limitation of his income and victory tax liability on compensation for services received in 1943 for services during and for a period of more than 36 months, as computed in his said return for 1943;

(2) The computation of his income from services during the years 1942 and 1943 on the theory that, *and as if he had been a member of a partnership,* Oranges Brothers Construction Division; * * * (Italics supplied.)

We submit that the above excerpt clearly shows that the taxpayers' sole basis for their refund claims is that George French, Jr., was not a partner and that the Commissioner erred in holding that he was. Moreover, it is evident that the Commissioner did not have to consider Section 107 of the Internal Revenue Code (Appendix, *infra)* either in determining the deficiencies or in passing on the refund claims. Thus, as the taxpayers point out (Br. 23), the reference to Section 107 in their claims is not so much a separate allegation of error as it is a legal conclusion which the taxpayers hoped to have adopted if French was found

to be an employee instead of a partner. Consequently, what the taxpayers were actually requesting in their refund claims and also later on in their suit against Collector Smyth (R. 3-7, 11-15) was that they be allowed to recover what they had paid as deficiencies. The District Court has allowed this request (R. 81) and such allowance also amounts to approval of the taxpayers' 1943 returns as filed. In the latter connection, it should be noted that in computing their income for the purpose of those returns the taxpayers proceeded on the theory that George French, Jr., was an employee of the company, not a partner, and so they allocated a large portion of the sum received from the company in 1943 to other years as provided in Section 107.[2] But, as we shall point out more fully below, the allocation of their income was not made on the returns as they now contend that it should be and so they now want to repudiate part of their tax returns although they alleged in their refund claims (R. 9, 17) that such returns "were in all respects true and correct returns". Moreover it is important to note that taxpayers did not refer in any way in their refund claims to the Current Tax Payment Act of 1943, c. 120, 57 Stat. 126, on which they must rely for recovery here.

---

[2]The reason Section 107 would not apply here to the company (which is a partnership) is that it had actually earned income throughout the years the construction work was being done, and the Commissioner tried to treat the amount due to George French, Jr., as having been earned in the same years as the company earned it but, as French did not withdraw such sums until later years, mostly in 1943, the District Court held this was salary in the years received but taxable in accordance with Section 107.

B. Variance between the refund claims and the amended complaints.

In justification of their attempt to recover part of the original taxes paid to Collector Berliner, taxpayers imply that if their refund claims are sufficient to allow recovery from Collector Smyth, they are also sufficient to allow recovery from Collector Berliner. But the District Court correctly held otherwise for the reason that the taxpayers are attempting to recover from the latter on a ground not set forth in the refund claims. Actually, if the taxpayers had thought that their original complaints were sufficient as to both Collectors, they would have merely asked permission to join Berliner as a defendant and would not have changed or added to their original complaints. But they know they had to add an additional ground in order to recover from Berliner. As we have pointed out, it was their original intention to recover only the deficiencies (which were paid to Smyth). Then when the taxpayers decided that they also had a ground on which they could recover part of the original tax it was too late to amend their claims or file new ones. Thus they have attempted to accomplish the same result by filing amended complaints which not only named Berliner as a defendant, along with Collector Smyth, but also included a new allegation, applicable only to Berliner. (R. 36, 41-42.) This new allegation in the complaint filed by George French, Jr., asserts (R. 36):

> That in making such computation plaintiff inadvertently and mistakenly omitted to claim for-

> giveness of 75% of his 1942 income tax liability in accordance with Sec. 6 of the Current Tax Payment Act. That plaintiff's correct total income and victory tax liability for the taxable year of 1943 on all incomes received from his employment by Oranges Brothers Construction Department and from other sources amounted to $49,538.92. That plaintiff paid to Harold A. Berliner, who was then Collector of Internal Revenue for the First Collection District of California, with his principal office at San Francisco, California, the tax of $69,150.12 * * *

The above allegation and a similar one in the amended complaint filed by Mrs. French are the first indications that the taxpayers were relying on Section 6 of the Current Tax Payment Act of 1943 (Appendix, *infra)* or thought that they had any rights under such Act which had not been allowed. Thus as stated by the District Court after considering the alleged errors in the refund claims (R. 61)—

> There is in those assignments not the slightest intimation, either of fact or of law, that the taxpayer was relying upon the "forgiveness" provisions of Section 6 of the Current Tax Payment Act of 1943.

Accordingly, we submit that the taxpayers have shifted their ground and are relying here on a section of law which was not set out or referred to in their claims for refund although that is required by the Regulations. *Real Estate Title Co. v. United States,* 309 U. S. 13; *Lucky Tiger-Combination Gold Mining Co. v. Crooks,*

95 F. 2d 885, 889 (C.A. 8th); *Continental-Illinois Nat. Bank & Trust Co. v. United States,* 67 F. 2d 153 (C.A. 7th).

The taxpayers of course object to the District Court's holding that the new allegations in the amended complaints should be treated as a new and separate ground for recovery. In this connection, they assert (Br. 32) that the application of the foregiveness feature of the law is but one step, and a rather mechanical step, in the computation of a Section 107 taxpayer's tax liability. Of course one answer which can be made to that contention is that each item which enters into a tax computation might be called one mechanical step. For example, it might be said that whether a sum should be deducted could also be called one step in a computation. But certainly it will be admitted that a taxpayer who seeks recovery on account of a claimed deduction must set forth the kind of deduction sought and the exact facts relating to it.

However, we think the better answer to taxpayers' argument is that there is more involved here than one mechanical step in a computation. Thus the variance is not attributable to a mere mathematical error but results from the interrelated effect of Section 107 (a) and the so-called forgiveness features in Section 6 of the Current Tax Payment Act of 1943 upon income received in lump sums in 1943 for services rendered by George French, Jr., over a period of years including 1942 and 1943. Hence, by taxpayers' amended complaints they raise a new issue, namely, whether

the provisions of Section 107 combined with Section 6 of the Current Tax Payment Act have the effect of reducing the tax on long-term compensation received in 1943 to the extent of the tax which would have been forgiven had an allocable portion actually been received in 1942. This issue obviously was not raised in the claims for refund and its solution depends on discovering the legislative intent of the above statutory provisions which were enacted for entirely unrelated reasons.

As we have pointed out, when the claims for refund were filed by the taxpayers on December 9, 1948 (R. 10, 18), the taxpayers were then contesting only the Commissioner's determination that George French, Jr., was a member of the partnership and the denial by the Commissioner of the benefits of Section 107 (a). Thus the taxpayers' claims, which covered only the amount of the deficiency, did not, even in a general way, take into consideration the forgiveness feature of the Current Tax Payment Act of 1943 and nothing was said therein to notify the Commissioner that the taxpayers considered their tax returns to be in error in computing the effect of Section 107. Instead, the claims made the positive assertion that the returns for both 1942 and 1943 "were in all respects true and correct". (R. 9, 17.) Therefore the taxpayers originally sought to *reinstate, not to change,* the method of computation they had adopted in their tax returns. Now they would repudiate what they did originally and would have their tax computed by applying Section 6 of the Current Tax Payment Act of 1943.

In taking such a position, taxpayers rely (Br. 27-28) principally on *Knox v. Commissioner,* 10 T.C. 550. This case does not involve a refund claim nor does it discuss the law relative to such claims, but it does involve both Section 107 (a) of the Internal Revenue Code and Section 6 of the Current Tax Payment Act of 1943. As six judges of the Tax Court joined in a very strong dissenting opinion in that case, we think the majority view expressed in the *Knox* case may be open to question, particularly in view of the very logical interpretation expressed in the dissenting opinion as to the various provisions in both sections. But, even if the *Knox* decision is a correct interpretation of the law, that does not help the taxpayers here. The Tax Court's opinion in the *Knox* case was promulgated on March 30, 1953, or nine months before the claims for refund were filed here and we are permitted to assume that such decision was known to the taxpayers or their counsel. But that decision was not referred to nor was there anything included in the claims to indicate that taxpayers wished to change their returns and have their tax computed in accordance with the *Knox* case. Taxpayers have indicated (R. 32) that the reason why the forgiveness feature of Section 6 was not referred to was that the Commissioner had published a regulation contrary to the *Knox* case. That is of course an excuse which also cannot help the taxpayers now. The taxpayers knew, and have admitted here, that every ground on which they relied for recovery should be set out in their claims and that any suit for recovery must be within the

limits set out in the claims. Consequently, if they interpreted the law as given in the *Knox* case and were relying on such interpretation they should of course have said so in their refund claims but they failed to make such a statement.

It should also be noticed here that the taxpayers are actually taking inconsistent positions on this matter. They are contending in effect that their refund claims are broad enough to cover all the grounds, or errors, alleged in their amended complaints, but at the same time they assert that they did not need to mention either Section 6 of the Current Tax Payment Act of 1943 or the alleged errors in the way Section 107 had been applied on their tax returns. Obviously they cannot properly take both positions.

Moreover, in making the latter assertion, they cannot correctly state that the new issue raised by the amended complaints applies merely to mechanical steps in the computation. Actually the issue is one to determine the year in which to allocate income. Under the Commissioner's original interpretation of Section 107, income received in a lump sum for services rendered over prior years was in fact income of the year in which received, but the portion allocable to the earlier years was taxable as if received in those years. However, when the computation was finished, all of the tax on such income was to be included with the tax of the year in which the income was received. But under the majority view in the *Knox* case, the tax on income allocated to 1942 was not included in the 1943

tax. Instead, such tax was not only computed at 1942 rates but was counted finally as a part of 1942 tax. See dissenting opinion in the *Knox* case, pp. 557-559. Thus it is clear that the new issue presents a complicated question relating to the interpretation of two unrelated statutory provisions and was certainly a matter which should have been set out in the refund claims.

C. The applicable cases which support the District Court's decision.

The taxpayers cite many cases relative to refund claims but as some of these cases are the ones also cited by the District Court and as most of them merely set forth the general principles already referred to we will not discuss them individually. It is of course obvious from what taxpayers point out about these cases that some involve different facts and are not helpful. As to other cases to which we will now refer, we think it is evident that taxpayers have ignored or underestimated the effect to be given to the clear and unambiguous language therein.

In stating the general rule relating to refund claims, this Court pointed out in *Rogan v. Ferry,* 154 F. 2d 974, 976, that the claim must set forth *in detail each ground* on which a refund is claimed and facts sufficient to apprise the Commissioner of the *exact basis thereof.* That means that the claim must give the Commissioner specific notice of both *the nature and the amount of the claim. United States v. Felt & Tarrant Co.,* 283 U.S. 269, 272; *Snead v. Elmore,* 59

F. 2d 312 (C.A. 5th); *H. Lissner Co. v. United States,* 52 F. 2d 1058 (C. Cls.). The reason for such rule is of course to permit the Commissioner to correct alleged errors in the first instance and, if the disagreement persists, to limit the subsequent litigation to issues which have been previously examined by the Commissioner. *Carmack v. Scofield,* 201 F. 2d 360, 362 (C.A. 5th).

Therefore, in preparing the claim for refund, the taxpayer must give a definite statement of the basis for his claim. In this connection, this Court in *Vica Co. v. Commissioner,* 159 F. 2d 148, 150, approved the statement in *Maas & Waldstein Co. v. United States,* 283 U. S. 583, 589, that—

> *Meticulous compliance* by the taxpayer with the prescribed conditions must appear before he can recover. (Italics supplied.)

Thus, even though the facts given in a claim might cover another ground, the taxpayer can recover only on the statutory provision relied on in the claim and cannot shift his ground to another provision subsequently when suit is filed. *Nemours Corp. v. United States,* 188 F. 2d 745 (C.A. 3d), certiorari denied, 342 U. S. 834; *A. M. Campau Realty Co. v. United States,* 69 F. Supp. 133 (C. Cls.); *Ronald Press Co. v. Shea,* 114 F. 2d 453 (C.A. 2d); also see *Mesta v. United States,* 137 F. 2d 426 (C.A. 3d).

In the *Nemours* case, the claim for refund was based on Section 26 (f) of the Revenue Act of 1936, c. 690,

49 Stat. 1648, as added by Section 501 of the Revenue Act of 1942, c. 619, 56 Stat. 798, but when suit was filed the taxpayer also relied on Section 26 (c)(3) of the same Act. Both sections were special relief provisions added in 1942 but the Court, in denying taxpayer the right to rely on the latter, stated (p. 750):

> It is to be noted that both the grounds for recovery and the facts supporting them must be shown. The taxpayer stated as its ground for refund Section 26(f) and made its computation accordingly. *That does not, under the decisions, give him a right to claim under some other section.* * * *
>
> This is hard law, no doubt. Perhaps it is necessarily strict law in view of the scope of the operations of a fiscal system as large as that of the United States. Whether that is so we are not called upon to say. We apply the rule; we do not make it. *It is to be observed that recovery of claims against the Government has always been the subject of a strict compliance requirement. The recovery of claims for tax refunds is but an application of this broad and strict rule.*
>
> * * * * * * *
>
> The taxpayer cannot recover under Section 26 (f) because as shown above we do not think he has made out a claim. He cannot get a refund under Section 26 (c)(3) because he did not state that Section as a ground when he filed his refund claim. * * * (Italics supplied.)

Consequently we submit that the taxpayers cannot minimize or ignore the variance between the ground

for the refund claims and the ground for recovery here merely by stating (Br. 29-30) that the Commissioner requires no aid from the taxpayer to be informed as to the applicable provisions of law governing the situation here. It is not a question of what the Commissioner may know about the law. It is a question as to what statutory provisions the taxpayers think should be interpreted and applied to give them a correct computation. In granting the privilege of suing the United States, Congress has purposely prescribed narrow limits in which to exercise this privilege and the Commissioner is not required to guess what a taxpayer wishes to recover or to determine what a taxpayer might have done. He needs only to look at the claim as actually filed and can hold a taxpayer to the specific claim as filed. This is so even though the Commissioner may have information in his own files which would substantiate the ground subsequently advanced by the taxpayer (*Angelus Milling Co. v. Commissioner,* 325 U. S. 293) or may ascertain, in the course of a general audit of taxpayer's accounts, sufficient facts to sustain the subsequent ground for recovery (*Mesta v. United States, supra).* It has long been said that when one deals with the Government he must turn square corners and there is no instance in which this is more true than in a suit for refund of taxes allegedly overpaid. The taxpayers here have not met the strict requirements for the maintenance of such a suit and are not entitled to recover.

CONCLUSION.

The decision of the District Court as to the appellee here is correct and should be affirmed.

Respectfully submitted,

H. Brian Holland,
Assistant Attorney General,
Ellis N. Slack,
Louise Foster,
Special Assistants to the Attorney General.

Lloyd H. Burke,
United States Attorney,
Charles Elmer Collett,
William H. Lally,
Assistant United States Attorneys.

October, 1953.

(Appendix Follows.)

Appendix.

Appendix

Internal Revenue Code:

SEC. 107 [As added by Sec. 220 of the Revenue Act of 1939, c. 247, 53 Stat. 862, and amended by Sec. 139 of the Revenue Act of 1942, c. 619, 56 Stat. 798, and Sec. 119 of the Revenue Act of 1943, c. 63, 58 Stat. 21]. COMPENSATION FOR SERVICES RENDERED FOR A PERIOD OF THIRTY-SIX MONTHS OR MORE AND BACK PAY.

(a) *Personal Services.*—If at least 80 per centum of the total compensation for personal services covering a period of thirty-six calendar months or more (from the beginning to the completion of such services) is received or accrued in one taxable year by an individual or a partnership, the tax attributable to any part thereof which is included in the gross income of any individual shall not be greater than the aggregate of the taxes attributable to such part had it been included in the gross income of such individual ratably over that part of the period which precedes the date of such receipt or accrual.

* * * * * * *

(26 U.S.C. 1946 ed., Sec. 107.)

SEC. 3772. SUITS FOR REFUND.

(a) *Limitations.*—

(1) *Claim.*—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected

without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

(2) *Time.*—No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of two years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim to which such suit or proceeding relates.

* * * * * * *

(26 U.S.C. 1946 ed., Sec. 3772.)

Current Tax Payment Act of 1943, c. 120, 57 Stat. 126:

SEC. 6. RELIEF FROM DOUBLE PAYMENTS IN 1943.

(a) *Tax for 1942 Not Greater Than Tax for 1943.*—In case the tax imposed by Chapter 1 of the Internal Revenue Code upon any individual * * * for the taxable year 1942 (determined without regard to this section, without regard to interest or additions to the tax, and without regard to credits against the tax for months withheld at source) is not greater than the tax for the taxable year 1943 (similarly determined), the liability of such individual for the tax imposed

by such chapter for the taxable year 1942 shall be discharged as of September 1, 1943, except that interest and additions to such tax shall be collected at the same time and in the same manner as, and as a part of, the tax under such chapter for the taxable year 1943. In such case if the tax for the taxable year 1942 (determined without regard to this section and without regard to interest or additions to the tax) is more than $50, the tax under such chapter for the taxable year 1943 shall be increased by an amount equal to 25 per centum of the tax for the taxable year 1942 (so determined) or the excess of such tax (so determined) over $50, whichever is the lesser. This subsection shall not apply in any case in which the taxpayer is convicted of any criminal offense with respect to the tax for the taxable year 1942 or in which additions to the tax for such taxable year are applicable by reason of fraud.

* * * * * * *

(d) [As amended by Sec. 506 of the Revenue Act of 1943, c. 63, 58 Stat. 21] *Rules for Application of Subsections (A), (B) and (C).*—

* * * * * * *

(3) *Foreign tax credit and application of sections 105, 106, and 107.*—The credit against the tax imposed by Chapter 1 of the Internal Revenue Code for the taxable year 1943 allowed by section 31 of such chapter (relating to taxes of foreign countries and of possessions of the United States), shall be determined without regard to subsections (a) and (b). Sections 105, 106, and 107 of such chapter (relating to limitations on tax) shall be applied without regard to subsections (a) and (b).

* * * * * * *

(h) *Regulations.*—This section shall be applied in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. (26 U.S.C. 1946 ed., Sec. 1622, note.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

SEC. 29.322-3 [As amended by T.D. 5325, 1944 Cum. Bull. 152]. *Claims for refund by taxpayers.*—Claims by the taxpayer for the refunding of taxes, interest, penalties, and additions to tax erroneously or illegally collected shall be made on Form 843, or on Form 1040 or Form 1040A, as provided in this section and should be filed with the collector of internal revenue. A separate claim shall be made for each taxable year or period.

No refund or credit will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim therefor except upon one or more of the grounds set forth in a claim filed prior to the expiration of such period. The claim must set forth in detail each ground upon which a refund is claimed, and facts sufficient to apprise the Commissioner of the exact basis thereof. * * *

* * * * * * *

No. 13,729

IN THE

United States Court of Appeals

For the Ninth Circuit

GEORGE FRENCH, JR., and MARY E. FRENCH,
Appellants,

vs.

HAROLD A. BERLINER, Former Collector of Internal Revenue,
Appellee.

On Appeal from the United States District Court for the Northern District of California.

SUPPLEMENTAL MEMORANDUM FOR THE APPELLEE.

H. BRIAN HOLLAND,
Assistant Attorney General,
ELLIS N. SLACK,
HILBERT P. ZARKY,
FRED E. YOUNGMAN,
Special Assistants to the Attorney General.

LLOYD H. BURKE,
United States Attorney,
CHARLES ELMER COLLETT,
Assistant United States Attorney.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Citations

Cases

Statutes

No. 13,729

IN THE

United States Court of Appeals

For the Ninth Circuit

GEORGE FRENCH, JR., and MARY E. FRENCH,
Appellants,

vs.

HAROLD A. BERLINER, Former Collector of Internal Revenue,
Appellee.

On Appeal from the United States District Court for the Northern District of California.

SUPPLEMENTAL MEMORANDUM FOR THE APPELLEE.

The original complaints in this proceeding (R. 3-7, 11-15) were filed on December 9, 1949 (R. 10, 18), against James G. Smyth, who was then Collector of Internal Revenue for the First District of California, to recover judgments in the respective amounts of $32,718.59 and $32,717.65, which amounts the taxpayers had theretofore paid to Collector Smyth in 1946 and 1947 as additional federal income taxes and interest assessed against them by the Commissioner of Internal Revenue for the taxable year 1943. The complaints were based upon claims for refund in

those amounts which the taxpayers had filed on December 28, 1948 (R. 7-10, 15-18, 78), and which had been finally disallowed by the Commissioner on November 7, 1949 (R. 80).

After the entry of judgment in both cases by the Court below in favor of Collector Smyth on a special verdict of a jury (R. 25-27) the Court granted a new trial (R. 29), and gave taxpayers leave to file amended complaints (R. 33).

Amended complaints (R. 34-44) were filed by the taxpayers on December 20, 1951 (R. 39, 44). By their amended complaints, the taxpayers sought the same recoveries against Collector Smyth, but by amendment, Harold A. Berliner, a former Collector of Internal Revenue, was made a party defendant, and recovery was sought against the latter in the respective amounts of $19,611.20 and $19,611.21.

On the second trial the Court below gave taxpayers judgment against Collector Smyth in the respective amounts of $32,718.59 and $32,578.28, with interest (R. 83-84), but denied judgment against former Collector Berliner. No appeal was taken from the judgment against Collector Smyth, but the taxpayers have appealed from that part of the judgment denying any recovery against former Collector Berliner (R. 85), and the only issue before this Court is the correctness of that part of the judgment below.

In a lengthy opinion filed on October 14, 1952 (R. 56-70), the Court below held that recovery could not be had against former Collector Berliner because the

ground on which recovery is sought against him had not been set forth in the taxpayers' refund claims.

The brief filed in this Court on behalf of former Collector Berliner is directed to supporting the judgment below, as to Berliner, on the ground approved by the District Court. However, at the argument of the appeal before this Court counsel for the Collector suggested that the judgment below may also be affirmed on the further ground that any recovery against former Collector Berliner is barred by the statute of limitations, and counsel were requested to submit memoranda directed to this issue.

It is axiomatic that the Government can be sued only with its consent, and subject to such conditions and limitations as Congress may prescribe. The timely filing of a proper claim for refund and the timeliness of the suit are among the conditions upon which the Government has consented to be sued for the recovery of internal revenue taxes erroneously or illegally collected, and are jurisdictional. *United States v. Chicago Golf Club,* 84 F. 2d 914, 917 (C.A. 7th); *Alexander Smith & Sons C. Co. v. Commissioner,* 117 F. 2d 974, 975 (C.A. 2d); *Vica Co. v. Commissioner,* 159 F. 2d 148 (C.A. 9th); *Edwards v. United States,* 163 F. 2d 268 (C.A. 9th).[1]

---

[1]Compare *Routzahn v. Reeves Bros. Co.,* 59 F. 2d 915 (C.A. 6th), certiorari denied, 287 U.S. 650; *United States v. Reeves Bros. Co.,* 83 F. 2d 121 (C.A. 6th), certiorari denied, 299 U.S. 573, rehearing denied, 301 U.S. 713; *A. G. Reeves Steel Const. Co. v. Weiss,* 119 F. 2d 472 (C.A. 6th), certiorari denied, 314 U.S. 677; *Roles v. Earle,* 195 F. 2d 346 (C.A. 9th), certiorari denied, 344 U.S. 819.

At the time of the argument it was suggested by counsel for the Collector that on the face of the record it appears that any recovery in this action against former Collector Berliner is barred, both as to the timeliness of the refund claims on which these suits are based to cover any part of the original 1943 taxes paid to Berliner, and also as to the timeliness of the suits against him. The District Court found (R. 78, Finding 12) that the claims filed on December 28, 1948, were timely as to the additional taxes and interest paid to Collector Smyth, for which he gave judgment, but the finding does not purport to apply to the original 1943 taxes paid to former Collector Berliner in 1943, refund of which would have been barred under Section 322(b)(1) and (2) of the Internal Revenue Code of 1939 at the time the refund claims were filed unless waivers had been executed which would have the effect of extending the time to the date of filing as provided in paragraph (3) of Section 322(b). See *Jones v. Liberty Glass Co.*, 332 U.S. 524. While the record is not clear on this point, taxpayers' Exhibit 5, introduced at the first trial but not printed in the record, purports to be such a waiver, executed under date of November 19, 1946, which would have the effect of extending to December 31, 1948, the time for filing a claim for refund of the original tax paid in 1943.

However, the claims here involved were only for refund of the additional 1943 taxes and interest paid to Collector Smyth in 1946 and 1947. They do not purport to claim a refund of any part of the taxes

paid to his predecessor in office. The taxpayers could not recover in their actions against Collector Smyth any part of the taxes paid to his predecessor in office. *Smietanka v. Indiana Steel Co.,* 257 U.S. 1; *Union Trust Co. v. Wardell,* 258 U.S. 537; *Levy v. Wardell,* 258 U.S. 542; *United States v. Reeves Bros. Co.,* 83 F. 2d 121 (C.A. 6th), certiorari denied, 299 U.S. 573, rehearing denied, 301 U.S. 713; *Brauch v. Birmingham,* 49 F. Supp. 229 (N.D. Iowa). Therefore, if any overplus resulted in their favor from a favorable determination of the issues presented by their refund claims and their suits against Collector Smyth the taxpayers would be left without remedy as to such overplus. That, apparently, was their reason for amending their complaints and naming former Collector Berliner a new party defendant, because no new issue of fact or law seems to have been raised by the amended complaints, whether warranted by their refund claims or not.

However, regardless of whether the taxpayers have overpaid their original 1943 taxes in the amounts claimed, we submit the record clearly shows on its face any recovery of such amounts from former Collector Berliner is barred because the suit against him was not brought within the time required by Section 3772(a) of the Internal Revenue Code of 1939, which reads in material part as follows:[2]

---

[2]While it was not raised or passed upon by the court below, it seems settled that in suits against the United States (and we see no basis for differentiation in this respect between such suits and suits against collectors of Internal Revenue for the recovery of taxes), the question of the timeliness of the suit, being jurisdic-

Sec. 3772. Suits for Refund.

(a) *Limitations.*—

(1) *Claim.*—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner, according to the provisions of law in that regard, and the regulations * * * established in pursuance thereof.

(2) *Time.*—No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, *nor after the expiration of two years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim to which*

---

tional, can be urged as a defense whenever it appears from the face of the record that the action was barred when brought, and the Government cannot be estopped by pleadings from relying on the statute of limitations. *Finn v. United States,* 123 U.S. 227, 232-233; *Carpenter v. United States,* 56 F. 2d 828, 829 (C.A. 2d); *Pacific Mills v. Nichols,* 72 F. 2d 103, 105 (C.A. 1st); *Gans S. S. Line v. United States,* 105 F. 2d 955, 957 (C.A. 2d), certiorari denied, 308 U.S. 613, rehearing denied, 310 U.S. 658; *A. G. Reeves Steel Const. Co. v. Weiss,* 119 F. 2d 472, 476 (C.A. 6th), certiorari denied, 314 U.S. 677; *De Bonis v. United States,* 103 F. Supp. 119, 122-123, 126 (W.D. Pa.). Also, on the right of an appellee to urge matter appearing in the record in support of the judgment below, see *Helvering v. Gowran,* 302 U.S. 238, 245-246, and cases cited, rehearing denied, 302 U.S. 781; *Le Tulle v. Scofield,* 308 U.S. 415.

such suit or proceeding relates. (Italics supplied.)

* * * * * * *

(26 U.S.C. 1952 ed., Sec. 3772.)

The refund claims on which the suits here involved are based were disallowed by the Commissioner on November 7, 1949. (R. 6, 14, 21, 24, 38, 43, 46-47, 49, 80.) The amended complaints, for the first time naming former Collector Berliner as a defendant and seeking recovery of a part of the original 1943 taxes paid to him in 1943, were filed on December 20, 1951 (R. 39, 44), which was after the two-year period prescribed by Section 3772(a)(2) of the 1939 Code had expired.[3]

In calling attention to the fact that suit against former Collector Berliner was barred at the time the amended complaints naming him as a defendant were filed it is in no way suggested that the trial Court cannot, within a reasonable exercise of its discretion, grant leave to amend, even after the time for instituting suit has expired—as was the case here, the order granting leave to amend having been entered on December 13, 1951 (R. 33)—or after the period for

[3]The only exception to the two-year limitation period prescribed by Section 3772(a)(2) is that contained in Section 3774(b)(2) of the 1939 Code, made applicable by Section 3772(a)(3)(B), clearly not applicable here, in the case of an agreement to that effect entered into by the taxpayer and the Commissioner. Also, the general six-year period provided by 28 U.S.C., Section 2401 (formerly Section 24, Twentieth, of the Judicial Code), does not apply to suits based on claims for refund of internal revenue taxes. See *United States v. A. S. Kreider Co.*, 313 U.S. 443.

filing suit on the rejected claims had expired.[4] Rather, the suggestion of the bar of the statute of limitations is based on the fact that the action against Berliner, although asserted in an amended complaint, is a new action as to him, and regardless of any merit as to the taxpayers' claim to having overpaid a portion of their original 1943 taxes, the right to proceed against Berliner for their recovery had expired two years after the rejection of their refund claims.[5] The situation here, so far as Berliner is concerned, is not materially different from that in *Third Nat. Bank & Trust Co. v. White,* 58 F. 2d 411 (Mass.), where suit was timely brought against a successor in office and later, by amendment, the predecessor in office to whom the taxes were paid was substituted as party defendant after the two-year period had expired and the Court properly held that the substitution of the new defendant by amendment constituted the beginning of a new action so far as the substituted defendant was concerned. To the same effect, but more interesting, is *Toledo Rys. & Light Co. v. McMaken,*

---

[4]In a similar situation the District Court of Maryland, in *State of Maryland v. Manor Real Estate & Trust Co.,* 83 F. Supp. 91, 94, affirmed in part and reversed in part on other grounds, 176 F. 2d 414 (C.A. 4th), arising under the Federal Tort Claims Act, refused leave to amend to add a new party defendant after the statute of limitations had run as to that defendant. See, also, *Phoenix State Bank & Trust Co. v. Bitgood,* 28 F. Supp. 899 (Conn.), where the trial court refused to substitute the United States as a party defendant after the period for bringing suit had expired.

[5]At all times material here former Collector Berliner was no longer in office; and by reason of the provisions of 28 U.S.C., Section 1346, the United States could have been made a party defendant instead of Berliner when the amended complaints were filed, but the result would have been the same.

17 F. Supp. 338 (N.D. Ohio), affirmed, *sub nom. Toledo Edison Co. v. McMaken,* 103 F. 2d 72 (C.A. 6th), certiorari denied, 308 U.S. 569, involving a suit brought against the proper Collector in 1912, with a later substitution of his successor in office, followed by voluntary reinstatement of the original Collector, then his personal representatives, after the time for suit against the original Collector had expired. See, also, *Mellon v. Weiss,* 270 U.S. 565; *Sweeney v. Greenwood Index-Journal Co.,* 37 F. Supp. 484, 487 (W.D. S.C.); *Royal Worcester Corset Co. v. White,* 40 F. Supp. 267 (Mass.); *Phoenix State Bank & Trust Co. v. Bitgood,* 28 F. Supp. 899 (Conn.).

While the above cases, and many others which could be cited to the same effect, involve substitution rather than addition of parties defendant we find no basis for differentiation. The present actions were timely as to Collector Smyth and the amounts paid to him, and the taxpayers have recovered judgments against him accordingly. But the amended complaints had no curative effect as to former Collector Berliner; the amended complaints constituted the beginning of a new action, personal as to him,[6] which the Court below held was based upon a ground not covered by their refund claims, and which the amended complaint, on its face clearly shows was brought after the two-year statute of limitations prescribed by Section 3772(a) of the 1939 Code had expired. It is an

---

[6]*Sage v. United States,* 250 U.S. 33; *Smietanka v. Indiana Steel Co.,* 257 U.S. 1; *United States v. Nunnally Investment Co.,* 316 U.S. 258; *Brauch v. Birmingham,* 49 F. Supp. 229 (N.D. Iowa).

action for the recovery of taxes paid to Berliner, and is not covered by an action against Collector Smyth. The action against former Collector Berliner, not being timely, should have been dismissed. Compare *Smallwood v. Gallardo,* 275 U.S. 56.

Respectfully submitted,

H. BRIAN HOLLAND,
Assistant Attorney General,
ELLIS N. SLACK,
HILBERT P. ZARKY,
FRED E. YOUNGMAN,
Special Assistants to the Attorney General.

LLOYD H. BURKE,
United States Attorney,
CHARLES ELMER COLLETT,
Assistant United States Attorney.

January, 1955.

No. 13734

United States
Court of Appeals
for the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,

vs.

THE ALBERTSON COMPANY, a Corporation,
Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—4-24-53

No. 13734

United States
Court of Appeals
for the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,

vs.

THE ALBERTSON COMPANY, a Corporation,
Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—4-24-53

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

INDEX PAGE

NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

WALTER S. BINNS,
United States Attorney;

E. H. MITCHELL and
EDWARD R. McHALE,
Assistants U. S. Attorney.

EUGENE HARPOLE and
FRANK W. MAHONEY,
Special Attorneys, Bureau of Internal Revenue,
600 Federal Bldg.,
Los Angeles 12, Calif.

For Appellee:

LATHAM & WATKINS,
830 Statler Center,
900 Wilshire Blvd.,
Los Angeles 17, Calif.

In the District Court of the United States in and for the Southern District of California, Central Division

No. 11960-PH Civil

THE ALBERTSON COMPANY, a Corporation,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

COMPLAINT FOR REFUND OF INCOME TAXES AND PERSONAL HOLDING COMPANY SURTAX

Comes now the plaintiff by its attorneys, Latham & Watkins, and for a cause of action against the defendant, alleges:

I.

Plaintiff is a corporation duly organized and operating under the laws of the State of California and maintains its principal place of business in the City of Los Angeles, County of Los Angeles, State of California.

II.

This action is filed pursuant to the provisions of 28 U.S.C.A. Sec. 1346 for the recovery of Federal income taxes and personal holding company surtax and interest thereon erroneously and illegally collected from the plaintiff for the calendar years 1944 and 1945. Said taxes and interest were collected by Harry C. Westover as Collector of Internal Revenue for the Sixth Collection District

of [2*] California, who is no longer in office as such Collector.

III.

Plaintiff owns and at all times herein mentioned owned, real property in the County of Los Angeles, State of California. During the calendar years 1944 and 1945, plaintiff sold certain parcels of said real property. In computing the adjusted basis for determining gain or loss from the sale of these properties the plaintiff included as a part of the cost of said properties, taxes paid by the plaintiff which were a lien on said properties at the time they were acquired and escrow fees, recording costs and other related expenses paid by the plaintiff as set forth fully in the plaintiff's claims for refund, marked Exhibits "A," "B," and "C" attached hereto.

IV.

Plaintiff duly filed its Federal income tax return for the calendar year 1944 with the Collector of Internal Revenue for the Sixth Collection District of California and paid in full the tax shown thereon to be due. Deducted from gross income on said return was loss incurred on the sale of said real property during the calendar year 1944, computed in the manner set forth in Paragraph III above.

V.

Plaintiff also filed its Federal return for personal holding companies for the calendar year 1944 with said Collector of Internal Revenue and paid

*Page numbering appearing at foot of page of original Certified Transcript of Record.

in full the tax shown thereon to be due. Undistributed Subchapter A net income shown on said return reflected loss incurred on the sale of said real property during the calendar 1944, computed in the manner set forth in Paragraph III above.

VI.

Said plaintiff likewise filed its Federal income tax return for the calendar year 1945 with said Collector of Internal Revenue and paid in full the tax shown thereon to be due. Included [3] in gross income on said return was income resulting from the gains realized on the sale of said real property during the calendar year 1945, computed in the manner set forth in Paragraph III above.

VII.

Upon examination of said returns the Commissioner of Internal Revenue, acting through the Internal Revenue Agent in Charge, Los Angeles division, determined that the plaintiff could not include said taxes, escrow fees, recording costs and other related expenses as a part of the cost of the properties sold in 1944 and in 1945, and disallowed said taxes, escrow fees, recording costs and other related expenses as part of the cost of said real property.

VIII.

As a result of the determinations as set forth in Paragraph VII above, said Commissioner of Internal Revenue assessed additional income taxes against the plaintiff in the amounts of $162.01 for the calendar year 1944 and $1,021.24 for the calen-

dar year 1945; in addition, said Commissioner of Internal Revenue assessed additional personal holding company tax against plaintiff in the amount of $4,479.70 for the calendar year 1944.

IX.

On or about September 16, 1947, the plaintiff paid to said Collector of Internal Revenue all said amounts stated in Paragraph VIII above; the total of said assessments paid being $5,662.95, together with interest thereon.

X.

By reason of said assessments and payments the plaintiff has overpaid its Federal income taxes for the calendar year 1944 by the amount of $145.63 and its personal holding company tax for the calendar year 1944, by the amount of $3,264.41; and its Federal incomes taxes for the calendar year 1945 by the amount of $1,203.67.

XI.

On or about September 6, 1949, the plaintiff filed with [4] said Collector of Internal Revenue its claims for the refunds of the overpayment of taxes for the calendar years 1944 and 1945. Copies of said claims are attached hereto as Exhibits "A," "B" and "C," respectively, and by this reference made a part of this complaint.

XII.

On or about July 10, 1950, the Commissioner of Internal Revenue mailed to the plaintiff a notice of

disallowance of the aforementioned claims for refund and each of them.

XIII.

The Federal income and personal holding company surtax liability of plaintiff for the calendar year 1944 was not in excess of $159.25 and $1,226.24, respectively; and the Federal income tax liability for the calendar year 1945 was not in excess of $74,126.64. Plaintiff has overpaid its Federal income and personal holding company surtax for the calendar year 1944 and its Federal income taxes for the calendar year 1945, respectively, by the amounts set forth in Paragraph X hereof.

Wherefore, the plaintiff prays that judgment may be entered herein against the defendant as follows:

1. In favor of the plaintiff for $4,431.28 with interest as provided by law;

2. For costs of suit; and

3. For such other relief as the Court may deem just and proper.

LATHAM & WATKINS,

By /s/ DANA LATHAM,
Attorneys for Plaintiff. [5]

State of California,
County of Los Angeles—ss.

C. L. Austin, being first duly sworn, deposes and says:

That he is Vice-President of The Albertson Company, a California corporation, plaintiff in the above-entitled action, and as such is authorized to execute this affidavit;

That he has read the foregoing Complaint for Refund of Income Taxes and Personal Holding Company Surtax and knows the contents thereof; and

That the same is true to the best of his knowledge and belief.

/s/ C. L. AUSTIN.

Subscribed and sworn to before me this 19th day of July, 1950.

[Seal] /s/ FLORENCE L. BIGELOW,
Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires Dec. 25, 1952. [6]

EXHIBIT A

Form 843
Treasury Department
Internal Revenue Service
(Revised July 1947)

Claim

To Be Filed With the Collector Where Assessment Was Made or Tax Paid

Collector's Stamp (Date Received) [Blank]

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse.

☐ Refund of Taxes Illegally, Erroneously, or Excessively Collected.

☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

☐ Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

State of California,
County of Los Angeles—ss.

Name of taxpayer or purchaser of stamps: The Albertson Company, a corporation.
Business address: 5225 Wilshire Blvd., Los Angeles 36, California.
Residence: .....

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed: Sixth California.

2. Period (if for tax reported on annual basis, prepare separate form for each taxable year) from Jan. 1, 1944, to Dec. 31, 1944.

3. Character of assessment or tax: income tax, chapter 1.

4. Amount of assessment, $304.88; dates of payment: 3/2/45, 142.87; 9/16/47, 162.01.

5. Date stamps were purchased from the Government: .....

6. Amount to be refunded plus interest from March 15, 1945: $145.63.

7. Amount to be abated (not applicable to income, gift, or estate taxes).....

8. The time within which this claim may be legally filed expires, under section 322(b) of the Internal Revenue Code on September 16, 1949.

The deponent verily believes that this claim should be allowed for the following reasons:

See attached sheet.

Signed:

THE ALBERTSON COMPANY,

By C. L. AUSTIN,
Vice President.

Subscribed and sworn to before me this 6 day of September, 1949.

.....
Deputy Collector.

The taxpayer sold the following real properties during the taxable year:

5001 N. Figueroa St., Los Angeles, California, being the Southwesterly 107 feet of the Northwesterly 125 feet of the Southeasterly 139 feet of Lot 1 of the Subdivision of Highland Park Tract as per map recorded in Book 5, Page 145, of Miscellaneous Records of Los Angeles County. Purchased March 21, 1924. Sold May 3, 1944.

707 E. Seventh St., Los Angeles, California,

being a tract of land bounded Northerly by Block 22 of the Wolfskill Orchard Tract, Easterly by Towne Ave., Southerly by Seventh St., and Westerly by Crocker St. in the City Lands of Los Angeles as per map recorded in Book 2, Pages 504, 505 of Miscellaneous Records of Los Angeles County. Purchased May 5, 1927. Sold May 31, 1944.

3320 Whittier Blvd., Los Angeles, California, being Lots 4, 5, and 6 of LaRosa Terrace as per map recorded in Book 22, Page 160 of Maps, Records of Los Angeles County. Purchased September 29, 1926. Sold April 12, 1944.

The adjusted basis for determining the loss from the sale of those properties should have included as a part of the cost of the properties the taxes which were a lien on the properties at the time they were acquired and which were assumed and paid by the taxpayer. Magruder v. Supplee, 316 U.S. 394; California Sanitary Company, Ltd. (1935), 32 BTA 122; Allen Anderson (1933), 27 BTA 980. The basis of the Seventh Street property should also have included the buyer's escrow fee, the fee for recording the deed, and the amount paid the seller in reimbursement of the buyer's pro rata share of the 1926 taxes calculated as applicable to the fiscal year July 1, 1926, to June 30, 1927, all of which were paid by the taxpayer through escrow.

These taxes and other costs are shown in detail in the tabulation below:

Property	Date Paid	Character of Payment	Amount
5001 N. Figueroa St.	11/29/24	1924 Taxes–1st inst.	$ 253.72
5001 N. Figueroa St.	4/24/25	1924 Taxes–2nd inst.	253.71
707 E. 7th St.	5/ 6/27	Buyer's escrow fee..	5.00
707 E. 7th St.	5/ 6/27	Recording deed	1.00
707 E. 7th St.	5/ 6/27	Taxes pro rata.....	413.37
707 E. 7th St.	11/30/27	1927 Taxes–1st inst.	1,333.51
707 E. 7th St.	4/26/28	1927 Taxes–2nd inst.	1,333.49
Whittier Blvd., Lot 4	12/ 2/26	1926 Taxes–1st inst.	43.15
Whittier Blvd., Lot 5	12/ 2/26	1926 Taxes–1st inst.	43.93
Whittier Blvd., Lot 6	12/ 2/26	1926 Taxes–1st inst.	58.05
Whittier Blvd., Lot 4	4/20/27	1926 Taxes–2nd inst.	43.13
Whittier Blvd., Lot 5	4/20/27	1926 Taxes–2nd inst.	43.91
Whittier Blvd., Lot 6	4/20/27	1926 Taxes–2nd inst.	58.05
Whittier Blvd.		Recording deed	(.60)
Total			$3,883.42

None of the above costs was included in the basis of the properties sold in determining the amount of the assessment shown on line 4 of this claim. Accordingly, taxpayer is entitled to a refund computed as follows:

Net income per Conferee's Revision enclosed in letter of July 17, 1947, from the Internal Revenue Agent in Charge, Los Angeles Division.....	$14,490.52
Less increase in basis of assets sold.....	3,883.42
Corrected net income.....	$10,607.10
Less U. S. obligation interest.....	5,792.87
Adjusted net income.....	$ 4,814.23
Less dividends received credit.....	4,092.10
Normal-tax net income.....	$ 722.13
Tax: $722.13 @ 15%.....	$ 108.32
Corrected net income, per above.....	$10,607.10
Less dividends received credit.....	9,016.04
Corporation surtax net income.....	$ 1,591.06
Surtax: $1,591.06 @ 10%.....	$ 159.11

Summary of Above Taxes

Normal tax	$ 108.32
Surtax	159.11
Total	$ 267.43
Less foreign income tax credit	108.18
Correct assessment	$ 159.25
Previously assessed and paid	304.88
Amount to be refunded, with interest	$ 145.63

EXHIBIT B

Form 843
Treasury Department
Internal Revenue Service
(Revised July 1947)

Claim
To Be Filed With the Collector Where Assessment Was Made or Tax Paid

Collector's Stamp (Date Received) [Blank]

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse.

☐ Refund of Taxes Illegally, Erroneously, or Excessively Collected.

☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

☐ Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

State of California,
County of Los Angeles—ss.
Name of taxpayer or purchaser of stamps: The Albertson Company, a corporation.
Business address: 5225 Wilshire Blvd., Los Angeles 36, California.
Residence: .....

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed: Sixth California.

2. Period (if for tax reported on annual basis, prepare separate form for each taxable year) from Jan. 1, 1944, to Dec. 31, 1944.

3. Character of assessment or tax: personal holding company surtax, chapter 2, subchapter A.

4. Amount of assessment, $4,490.65; dates of payment: 3/2/45, 10.95; 9/16/47, 4,479.70.

5. Date stamps were purchased from the Government: .....

6. Amount to be refunded plus interest from March 15, 1945: $3,264.41.

7. Amount to be abated (not applicable to income, gift, or estate taxes).....

8. The time within which this claim may be legally filed expires, under sections 508 and 322(b) of Internal Revenue Code on September 16, 1949.

The deponent verily believes that this claim should be allowed for the following reasons:

See attached sheet.

Signed:

THE ALBERTSON COMPANY,

By C. L. AUSTIN,
Vice President.

Subscribed and sworn to before me this 6 day of September, 1949.

.....
Deputy Collector.

The taxpayer sold the following real properties during the taxable year:

5001 N. Figueroa St., Los Angeles, California, being the Southwesterly 107 feet of the Northwesterly 125 feet of the Southeasterly 139 feet of Lot 1 of the Subdivision of Highland Park Tract as per map recorded in Book 5, Page 145, of Miscellaneous Records of Los Angeles County. Purchased March 21, 1924. Sold May 3, 1944.

707 E. Seventh St., Los Angeles, California, being a tract of land bounded Northerly by Block 22 of the Wolfskill Orchard Tract, Easterly by Towne Ave., Southerly by Seventh St., and Westerly by Crocker St. in the City Lands of Los Angeles as per map recorded in Book 2, Pages 504, 505 of Miscellaneous Records of Los Angeles County. Purchased May 5, 1927. Sold May 31, 1944.

3320 Whittier Blvd., Los Angeles, California, being Lots 4, 5, and 6 of LaRosa Terrace as per

map recorded in Book 22, Page 160 of Maps, Records of Los Angeles County. Purchased September 29, 1926. Sold April 12, 1944.

The adjusted basis for determining the loss from the sale of those properties should have included as a part of the cost of the properties the taxes which were a lien on the properties at the time they were acquired and which were assumed and paid by the taxpayer. Magruder v. Supplee, 316 U.S. 394; California Sanitary Company, Ltd. (1935), 32 BTA 122; Alden Anderson (1933), 27 BTA 980. The basis of the Seventh Street property should also have included the buyer's escrow fee, the fee for recording the deed, and the amount paid the seller in reimbursement of the buyer's pro rata share of the 1926 taxes calculated as applicable to the fiscal year July 1, 1926, to June 30, 1927, all of which were paid by the taxpayer through escrow.

These taxes and other costs are shown in detail in the tabulation below:

Property	Date Paid	Character of Payment	Amount
5001 N. Figueroa St.	11/29/24	1924 Taxes–1st inst.	$ 253.72
5001 N. Figueroa St.	4/24/25	1924 Taxes–2nd inst.	253.71
707 E. 7th St.	5/ 6/27	Buyer's escrow fee..	5.00
707 E. 7th St.	5/ 6/27	Recording deed	1.00
707 E. 7th St.	5/ 6/27	1926 Taxes pro rata	413.37
707 E. 7th St.	11/30/27	1927 Taxes–1st inst.	1,333.51
707 E. 7th St.	4/26/28	1927 Taxes–2nd inst.	1,333.49
Whittier Blvd., Lot 4	12/ 2/26	1926 Taxes–1st inst.	43.15
Whittier Blvd., Lot 5	12/ 2/26	1926 Taxes–1st inst.	43.93
Whittier Blvd., Lot 6	12/ 2/26	1926 Taxes–1st inst.	58.05
Whittier Blvd., Lot 4	4/20/27	1926 Taxes–2nd inst.	43.13
Whittier Blvd., Lot 5	4/20/27	1926 Taxes–2nd inst.	43.91
Whittier Blvd., Lot 6	4/20/27	1926 Taxes–2nd inst.	58.05
Whittier Blvd.		Recording deed	(.60)
Total			$3,883.42

None of the above costs was included in the basis of the properties sold in determining the amount of the assessment shown on line 4 of this claim. Accordingly, taxpayer is entitled to a refund computed as follows:

Revised undistributed subchapter A net income per Conferee's Revision enclosed in letter of July 17, 1947, from the Internal Revenue Agent in Charge, Los Angeles Division	$5,518.41
Less increase in basis of assets sold	3,883.42
Corrected undistributed subchapter A net income	$1,634.99
Surtax: $1,634.99 @ 75%	$1,226.24
Previously assessed and paid	4,490.65
Amount to be refunded, with interest	$3,264.41

EXHIBIT C

Form 843
Treasury Department
Internal Revenue Service
(Revised July 1947)

Claim

To Be Filed With the Collector Where Assessment Was Made or Tax Paid

Collector's Stamp (Date Received) [Blank]

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse.

- ☐ Refund of Taxes Illegally, Erroneously, or Excessively Collected.
- ☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.
- ☐ Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

State of California,
County of Los Angeles—ss.

Name of taxpayer or purchaser of stamps: The Albertson Company, a corporation.

Business address: 5225 Wilshire Blvd., Los Angeles 36, California.

Residence: .....

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed: Sixth California.

2. Period (if for tax reported on annual basis, prepare separate form for each taxable year) from Jan. 1, 1945, to Dec. 31, 1945.

3. Character of assessment or tax: income tax, chapter 1.

4. Amount of assessment, $75,330.31; dates of payment: 12/29/45, $74,309.07; 9/16/47, $1,021.24.

5. Date stamps were purchased from the Government: .....

6. Amount to be refunded plus interest from March 15, 1946: $1,021.24.

7. Amount to be abated (not applicable to income, gift, or estate taxes) .....

8. The time within which this claim may be legally filed expires, under section 322(b) of the Internal Revenue Code on September 16, 1949.

The deponent verily believes that this claim should be allowed for the following reasons:

See attached sheet.

Signed:

THE ALBERTSON COMPANY,

By C. L. AUSTIN,
Vice President.

Subscribed and sworn to before me this 6 day of September, 1949.

.....
Deputy Collector.

The taxpayer sold the following real properties during the taxable year:

4927 S. Vermont Ave., Los Angeles, California, being Lots 5 and 6, Block 24, Vermont Ave. Square, as per map recorded in Book 11, Page 33 of Maps, Records of Los Angeles County. Purchased September 13, 1923. Sold April 19, 1945.

The Southeast corner of Wilshire Blvd., and McCarty Drive, Beverly Hills, California, being Lots 3, 4, and 5, Tract 6648, as per map recorded in Book 71, Page 48 of Maps, Records of Los Angeles County. Acquired May 3, 1928. Sold April 19, 1945.

The adjusted basis for determining the gain from the sale of those properties should have included as a part of the cost of the properties the taxes which were a lien on the properties at the

time they were acquired and which were assumed and paid by the taxpayer. Magruder v. Supplee, 316 U.S. 394; California Sanitary Company, Ltd. (1935), 32 BTA 122; Alden Anderson (1933), 27 BTA 980. The basis of the Beverly Hills property should also have included street lighting assessments which were a lien when the property was acquired, additional costs of a Highland Park lot exchanged for the Beverly Hills lots representing taxes which were a lien when that lot was purchased, escrow expense and assessment for municipal improvement, commission paid on the exchange, title policy fee, escrow fees on exchange, and cost of drawing and recording deed.

The above costs are shown in detail in the tabulation below:

Property	Date Paid	Character of Payment	Amount
4927 S. Vermont Ave.	11/30/23	1923 Taxes–1st inst.	$ 149.35
4927 S. Vermont Ave.	4/25/24	1923 Taxes–2nd inst.	149.32
Wilshire & McCarty, B. H.	1/19/24	Escrow fee on Highland Park Lot.....	6.20
Wilshire & McCarty, B. H.	1/19/24	1923 Taxes on Highland Park Lot.....	63.00
Wilshire & McCarty, B. H.	2/14/27	Assessment, Arroyo #1 Improvement District, on Highland Park Lot.....	40.30
Wilshire & McCarty, B. H.	5/11/28	Commission to Beverly Hills Realty Co.	2,000.00
Wilshire & McCarty, B. H.	5/11/28	Pro rata 1927 taxes paid to vendor.....	183.37
Wilshire & McCarty, B. H.	5/11/28	Pro rata 1928 lighting assessments paid to vendor.....	82.08
Wilshire & McCarty, B. H.	5/11/28	Title Policy fee.....	80.50

Property	Date Paid	Character of Payment	Amount
Wilshire & McCarty, B. H.	5/11/28	Escrow fees	30.00
Wilshire & McCarty, B. H.	5/11/28	Drawing & recording deed	3.20
Wilshire & McCarty, B. H.	11/28/28	1928 Taxes–1st inst.	1,013.68
Wilshire & McCarty, B. H.	4/24/29	1928 Taxes–2nd inst.	1,013.68
Total			$4,814.68

None of the above costs was included in the basis of the properties sold in determining the amount of the assessment shown on line 4 of this claim. Accordingly, taxpayer is entitled to a refund computed as follows:

Tax Imposed by Section 13, I.R.C.

Revised Net Income per Conferee's Revision enclosed in letter of July 17, 1947, from the Internal Revenue Agent in Charge, Los Angeles Division		$ 51,567.48
Plus revised net capital gain per above Conferee's Revision		273,702.77
Net Income		$325,270.25
Less reduction in gain on sale of assets by reason of including above costs in basis		4,814.68
Corrected Net Income		$320,455.57
Less: U. S. obligations interest	$ 308.63	
Dividends received credit	26,877.96	27,186.59
Normal-tax net income		$293,268.98
Tax @ 24%		$ 70,384.56

Tax Imposed by Section 15, I.R.C.

Corrected Net Income, per above	$320,455.57
Less: Dividends received credit	24,837.96
Corporation surtax net income	$295,617.61
Tax @ 16%	$ 47,298.82

Tax Imposed by Section 500, I.R.C.

Revised Subchapter A net income per above-mentioned Conferee's Revision	$252,142.64
Less Reduction in gain on sale of assets by reason of including above costs in basis	4,814.68
Corrected Subchapter A Net Income	$247,327.96
Undistributed Subchapter A Net Income	$247,327.96
Surtax:	
$ 2,000.00 @ 75%	$ 1,500.00
245,327.96 @ 85%	208,528.77
Total Surtax	$210,028.77

Summary of Above Taxes

Sec. 13	$ 70,384.56
Sec. 15	47,298.82
Sec. 500	210,028.77
Total	$327,712.15

Tax Imposed by Section 117(c)(1), I.R.C.

Normal-tax net income		$293,268.98
Less: Excess of net long-term capital gain over net short-term capital loss per Conferee's Revision	$273,702.77	
Less reduction in gain by reason of including above costs in basis	4,814.68	$268,888.09
Balance subject to normal tax		24,380.89
Corporation surtax net income		$295,617.61
Less: Excess of net long-term capital gain over net short-term capital loss, as corrected		268,888.09
Adjusted surtax net income		$ 26,729.52
Undistributed Subchapter A net income		$247,327.96
Less: Excess of net long-term capital gain over net short-term capital loss, as corrected		268,888.09
Remainder		$ None

Partial Tax:	
Sec. 14	$ 4,132.37
Sec. 15	2,880.49
Sec. 500	None
Total partial tax	$ 7,012.86
25% of Excess of net long-term capital gain over net short-term capital loss, as corrected—$268,888.09	67,222.02
Total Alternative Tax	$ 74,234.88
Less: Foreign income tax credit	108.24
Correct Assessment	$ 74,126.64
Previously assessed and paid	75,330.31
Overpayment	$ 1,203.67
Amount to be refunded, with interest (limited to amount paid Sept. 16, 1947)	$ 1,021.24

[Endorsed]: Filed July 26, 1950.

[Title of District Court and Cause.]

SUMMONS

To the above-named Defendant:

You are hereby summoned and required to serve upon Latham & Watkins, plaintiff's attorney, whose address is 411 W. Fifth St., Los Angeles 13, Calif., an answer to the complaint which is herewith served upon you, within Sixty days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Date: 7/26/50.

[Seal] EDMUND L. SMITH,
Clerk of Court.

By /s/ EDW. F. DREW,
Deputy Clerk. [19]

Return on Service of Writ

I hereby certify and return, that on the 10th day of August, 19..., I received this summons and served it together with the complaint herein as follows:

Service on the United States Attorney by leaving a true and correct copy with Gertrude M. Johnson, authorized to accept service; and service on the Attorney General of the United States by registered mail to the Department of Justice, Washington, D. C.; and service on the Collector of Internal Revenue by leaving a true and correct copy with C. M. Commins, authorized to accept service for same.

JAMES J. BOYLE,
United States Marshal.

By /s/ TOSHIE SHIMIZU,
Deputy U. S. Marshal.

[Endorsed]: Filed August 11, 1950.

[Title of District Court and Cause.]

STIPULATION AND ORDER EXTENDING TIME TO APPEAR

It Is Hereby Stipulated, by and between the parties hereto, that the defendant may have to and including December 8, 1950, within which to appear, answer or otherwise plead for the reason that defendant's counsel have not yet received the infor-

mation necessary to enable them to plead to the plaintiff's complaint.

Dated: At Los Angeles, California, this 4th day of October, 1950.

LATHAM & WATKINS

By /s/ AUSTIN H. PECK, JR.,
Attorneys for Plaintiff.

ERNEST A. TOLIN,
United States Attorney;

E. H. MITCHELL and
EDWARD R. McHALE,
Assistants U. S. Attorney.

EUGENE HARPOLE and
FRANK W. MAHONEY,
Special Attorneys, Bureau of Internal Revenue.

/s/ E. H. MITCHELL,
Attorneys for Defendant.

It Is So Ordered this 12th day of October, 1950.

/s/ PEIRSON M. HALL,
Judge.

[Endorsed]: Filed Oct. 12, 1950. [21]

[Title of District Court and Cause.]

STIPULATION AND ORDER EXTENDING TIME TO APPEAR

It Is Hereby Stipulated, by and between the parties hereto, that the defendant may have to and including January 15, 1951, within which to appear, answer or otherwise plead for the reason that defendant's counsel have not yet received the information necessary to enable them to plead to the plaintiff's complaint.

Dated: At Los Angeles, California, this 5th day of December, 1950.

LATHAM & WATKINS,

By /s/ RICHARD F. ALDEN,
Attorneys for Plaintiff.

ERNEST A. TOLIN,
United States Attorney;
E. H. MITCHELL and
EDWARD R. McHALE,
Assistants U. S. Attorney.
EUGENE HARPOLE and
FRANK W. MAHONEY,
Special Attorneys, Bureau of Internal Revenue.

/s/ E. H. MITCHELL,
Attorneys for Defendant.

It Is So Ordered this 8th day of December, 1950.

/s/ PEIRSON M. HALL,
Judge.

[Endorsed]: Filed Dec. 8, 1950. [22]

[Title of District Court and Cause.]

STIPULATION AND ORDER EXTENDING TIME TO APPEAR

It Is Hereby Stipulated, by and between the parties hereto, that the defendant may have to and including February 14, 1951, within which to appear, answer or otherwise plead for the reason that defendant's counsel have not yet received the information necessary to enable them to plead to the plaintiff's complaint.

Dated: At Los Angeles, California, this 15th day of January, 1951.

LATHAM & WATKINS,

By /s/ AUSTIN H. PECK, JR.,
Attorneys for Plaintiff.

ERNEST A. TOLIN,
United States Attorney;
E. H. MITCHELL and
EDWARD R. McHALE,
Assistants U. S. Attorney.
EUGENE HARPOLE and
FRANK W. MAHONEY,
Special Attorneys, Bureau of Internal Revenue.

By /s/ E. H. MITCHELL,
Attorneys for Defendant.

It Is So Ordered this 22nd day of January, 1951.

/s/ PEIRSON M. HALL,
Judge.

[Endorsed]: Filed Jan. 22, 1951. [23]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT UNITED STATES OF AMERICA

Comes now the defendant in the above-entitled action and in answer to plaintiff's complaint, admits, denies and alleges:

I.

Admits the allegations contained in paragraph I thereof.

II.

Admits the allegations contained in paragraph II thereof, except that it is denied that either the income taxes or the personal holding company surtax and interest thereon was or were erroneously and/or illegally collected from the plaintiff for the calendar years 1944 and 1945.

III.

Admits the allegations contained in paragraph III thereof, except that each and every allegation contained in the plaintiff's claims for refund attached to the complaint of the plaintiff, as Exhibits "A," "B," and "C," is specifically denied except those that are admitted in this answer.

IV.

Admits the allegations contained in paragraph IV thereof. [24]

V.

Admits the allegations contained in paragraph V thereof.

VI.

Admits the allegations contained in paragraph VI thereof.

VII.

Admits the allegations contained in paragraph VII thereof.

VIII.

Admits the allegations contained in paragraph VIII thereof.

IX.

Admits the allegations contained in paragraph IX thereof.

X.

Denies the allegations contained in paragraph X thereof.

XI.

Admits the allegations contained in paragraph XI thereof, except that each and every allegation contained in the claims for refund filed by the plaintiff on September 6, 1949, and attached to the complaint as Exhibits "A," "B," and "C," is specifically denied, except those that are admitted in this answer.

XII.

Admits the allegations contained in paragraph XII thereof.

XIII.

Denies the allegations contained in paragraph XIII thereof.

XIV.

The defendant alleges that the taxes, escrow fees, recording costs, and other related expenses referred to in paragraphs III and VII of the complaint were not capitalized but instead were deducted by the plaintiff, and tax benefits were received therefor, on the income tax returns of the plaintiff for the years 1923 through 1929, respectively, as the expenses were paid, in determining the plaintiff's net income subject to tax in each of such years.

XV.

The defendant alleges that the deductions so taken by plaintiff [25] as to the taxes, escrow fees, recording costs and other related expenses referred to in paragraph XIV of this answer, in equity and good conscience cannot be included as a part of the cost of the properties referred to in paragraph III of the complaint, and cannot be so included under Section 113(b)(1)(A) of the Internal Revenue Code.

Wherefore, having fully answered, defendant prays that it be hence dismissed with its costs in this behalf expended.

ERNEST A. TOLIN,
United States Attorney;

E. H. MITCHELL and
EDWARD R. McHALE,
Assistants U. S. Attorney.

EUGENE HARPOLE and
FRANK W. MAHONEY,
Special Attorneys, Bureau of
Internal Revenue.

/s/ E. H. MITCHELL,
Attorneys for Defendant,
United States of America.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Feb. 14, 1951. [26]

[Title of District Court and Cause.]

STIPULATION OF FACTS

Plaintiff and Defendant in the above-entitled cause, through their respective counsel, hereby stipulate that the following facts are true, without prejudice to the right of either party to adduce additional evidence not inconsistent herewith, and reserving to each party the right to object to any facts herein stated upon the grounds of irrelevancy and immateriality:

I.

Plaintiff is a corporation duly organized and operating under the laws of the State of California. It maintains its principal place of business in Los Angeles, California. [28]

II.

Plaintiff filed its federal income tax return, Treasury Department form 1120, and its federal

personal holding company return, Treasury Department form 1120H, for the calendar year 1944 in the office of the Collector of Internal Revenue for the Sixth District of California at Los Angeles, California. Plaintiff filed its federal income tax return, Treasury Department form 1120, for the calendar year 1945 in the office of said Collector. Each of said returns was filed within the time prescribed therefor by the applicable provisions of the Internal Revenue Code.

III.

On March 21, 1924, plaintiff purchased the real property at 5001 North Figueroa Street, Los Angeles, California, being the Southwesterly 107 feet of the Northwesterly 125 feet of the Southeasterly 139 feet of Lot 1 of the Subdivision of Highland Park Tract as per map recorded in Book 5, Page 145, of Miscellaneous Records of Los Angeles County. At the time of said purchase, said real property was subject to the lien for real property taxes for the fiscal year July 1, 1924, to June 30, 1925. Said taxes were paid by plaintiff as follows:

Date Paid	Character of Payment	Amount
11/29/24	1924 Taxes—1st inst.	$253.72
4/24/35	1924 Taxes—2nd inst.	$253.71
	Total	$507.43

IV.

Plaintiff sold the real property described in paragraph III hereof on or about May 3, 1944. In com-

puting its loss resulting from said sale, plaintiff included in the basis (unadjusted) of said property said sum of $507.43.

V.

On May 5, 1927, plaintiff purchased the real property at 707 East Seventh Street, Los Angeles, California, being a tract of [29] land bounded Northerly by Block 22 of Wolfskill Orchard Tract, Easterly by Towne Avenue, Southerly by Seventh Street, and Westerly by Crocker Street in the City Lands of Los Angeles as per map recorded in Book 2, pages 504, 505 of Miscellaneous Records of Los Angeles County. At the time of said purchase, said real property was subject to the lien for real property taxes for the fiscal year July 1, 1927, to June 30, 1928; and in addition, plaintiff paid the seller a pro rata share of the taxes on said property applicable to the fiscal year July 1, 1926, to June 30, 1927. Other costs of said purchase were the buyer's escrow fee and the fee for recording the deed. Said taxes and other costs were paid by plaintiff as follows:

Date Paid	Character of Payment	Amount
5/ 6/27	Buyer's escrow fee	$ 5.00
5/ 6/27	Recording deed	1.00
5/ 6/27	1926 pro rata taxes	413.37
11/30/27	1927 Taxes—1st inst.	1,333.51
4/26/28	1927 Taxes—2nd inst.	1,333.49
	Total	$3,086.37

VI.

Plaintiff sold the real property described in paragraph V hereof on or about May 31, 1944. In computing its loss resulting from said sale, plaintiff included in the basis (unadjusted) of said property said sum of $3,086.37.

VII.

On September 29, 1926, plaintiff purchased the real property at 3320 Whittier Boulevard, Los Angeles, California, being Lots 4, 5, and 6 of La Rosa Terrace as per map recorded in Book 22, Page 160 of Maps, Records of Los Angeles County. At the time of said purchase, said real property was subject to the lien for real property taxes for the fiscal year July 1, 1926, to June 30, 1927. Other costs of said purchase were the buyer's fee for recording the deed. [30] Said taxes and other costs were paid by plaintiff as follows:

Lot	Date Paid	Character of Payment	Amount
4	12/2/26	1926 Taxes—1st inst.	$ 43.15
5	12/2/26	1926 Taxes—1st inst.	43.93
6	12/2/26	1926 Taxes—1st inst.	58.05
4	4/20/27	1926 Taxes—2nd inst.	43.13
5	4/20/27	1926 Taxes—2nd inst.	43.91
6	4/20/27	1926 Taxes—2nd inst.	58.05
		Recording deed	(.60)
		Total	$289.62

VIII.

Plaintiff sold the real property described in paragraph VII hereof on or about April 12, 1944. In

computing its loss resulting from said sale, plaintiff included in the basis (unadjusted) of said property said sum of $289.62.

IX.

On September 13, 1923, plaintiff purchased the real property at 4927 South Vermont Avenue, Los Angeles, California, being Lots 5 and 6, Block 24, Vermont Avenue Square, as per map recorded in Book 11, Page 33 of Maps, Records of Los Angeles County. At the time of said purchase, said real property was subject to the lien for real property taxes for the fiscal year July 1, 1923, to June 30, 1924. Said taxes were paid by plaintiff as follows:

Date Paid	Character of Payment	Amount
11/30/23—1923	Taxes—1st inst.	$149.35
4/25/24—1923	Taxes—2nd inst.	149.32
	Total	$298.67

X.

Plaintiff sold the real property described in paragraph IX hereof on or about April 19, 1945. In computing its gain resulting from said sale, plaintiff included in the basis (unadjusted) of said property said sum of $298.67. [31]

XI.

On May 3, 1928, plaintiff acquired the real property at the Southeast Corner of Wilshire Boulevard and McCarty Drive, Beverly Hills, California, being

Lots 3, 4, and 5, Tract 6648, as per map recorded in Book 71, Page 48 of Maps, Records of Los Angeles County. At the time of said purchase, said real property was subject to the lien for real property taxes for the fiscal year July 1, 1928, to June 30, 1929. In addition plaintiff paid the seller a pro rata share of the taxes and lighting assessments on said property applicable to the fiscal year July 1, 1927, to June 30, 1928. Other costs were escrow fees, commission paid, title policy fee, and cost of drawing and recording deed. As a part of said acquisition plaintiff exchanged a lot in Highland Park, California; said lot, when purchased by plaintiff, was subject to the lien for real property taxes for the fiscal year July 1, 1923, to June 30, 1924. In addition, an escrow fee was incurred in connection with such purchase; and an improvement assessment was later paid. All of the taxes and other costs above described were paid by the plaintiff as follows:

Date Paid	Character of Payment	Amount
1/19/24	Escrow fee on Highland Park Lot	$ 6.20
1/19/24	1923 Taxes on Highland Park Lot	63.00
2/14/27	Assessment, Arroyo #1, Improvement District, on Highland Park Lot	40.30
5/11/28	Commission to Beverly Hills Realty Co.	2,000.00

Date Paid	Character of Payment	Amount
5/11/28—	Pro rata 1927 taxes paid to vendor	183.37
5/11/28—	Pro rata 1928 lighting assessment paid to vendor	82.08
5/11/28—	Title Policy fee	80.50
5/11/28—	Escrow fee	30.00
5/11/28—	Drawing & recording deed	3.20
11/28/28—	1928 Taxes—1st inst.	1,013.68
4/24/29—	1928 Taxes—2nd inst.	1,013.68
	Total	$4,516.01

XII.

Plaintiff sold the real property described above in paragraph XI on or about April 19, 1945. In computing its gain resulting from said sale, plaintiff included in the basis (unadjusted) of said property said sum of $4,516.01.

XIII.

The amounts so included in basis (unadjusted) of the several properties sold as above described had been deducted by plaintiff from gross income in the years in which paid in determining plaintiff's net income subject to tax for said years. Said deductions resulted in tax benefits to plaintiff in said years of payment in the total amount of $1,070.52. Of said total benefit, $500.45 was realized by plaintiff by reason of deduction of the items hereinabove described applicable to the parcels sold in 1944; and the balance of $570.07 was the result of the deduction of the items hereinabove described attributable to the parcels sold in 1945.

XIV

Field and/or office audits of plaintiff's federal income tax returns for the calendar years 1923, 1924, 1925, 1926, 1927, 1928, and 1929 were made by the Office of the Internal Revenue Agent in Charge at Los Angeles, California, and written reports of the audits covering the years 1923, 1926, 1927 and 1929 and the period January 1 to June 30, 1928, were submitted to plaintiff. None of said reports disallowed or otherwise adjusted any of the deductions, or any portion thereof, taken by plaintiff as hereinabove described. The following statements are quoted from said reports:

(a) Report of Revenue Agent Carl E. Siegmund, dated January 6, 1927, covering plaintiff's return for the calendar year 1923: [33]

> "Compensation of officers, interest, taxes and general expenses for 1923 were verified with the records available, and outside of some corrections as to general expenses, were found correct as reported."

(b) Report of Revenue Agent Claude A. Dewey, dated December 13, 1929, covering plaintiff's return for the calendar year 1927:

> "The examining officer has accepted the depreciation rates and amounts claimed per the returns filed. Haskins & Sells audit for 1927 disclosed retirements based on assets exhausted and the net assets after these adjustments appear substantially correct.
>
> "Complete cooperation was given the exam-

iner by this taxpayer and his (sic) accountants."

(c) Report of Revenue Agent R. M. Allan, dated February 20, 1930, covering plaintiff's return for the six months period ended June 30, 1928:

"The additions to the land account during the year amounted to $120,000 representing the cash payment in connection with the exchange of vacant property in Highland Park for three lots in Beverly Hills."

(d) Report of Revenue Agent George W. Givan, dated December 16, 1931, covering the calendar year 1929:

"On February 24, 1930, the Franchise Tax Commissioner of the State of California proposed a deficiency in tax of $2,871.07 due and payable as of May 15, 1929, and September 15, 1929. The taxpayer protested this amount on May 14, 1930, and agreed to the payment of an additional amount of $400.22 on June 10, 1930. The difference of $2,470.85 was credited to surplus in 1930.

"The taxpayer adjusted its books in 1929 by debiting State franchise taxes paid and crediting accounts payable [34] in the amount of $2,871.07. Since this amount was only a contingent liability on December 31, 1929, the taxpayer may only deduct in 1929 the amount of the actual liability in 1929 which was determined to be $400.22. The difference of $2,470.85 is to be restored to income for the year 1929."

(e) On September 15, 1927, plaintiff received a letter from the Internal Revenue Agent in Charge in Los Angeles, California, covering the years 1924 and 1925, which letter stated as follows:

> "Upon the basis of information received, recommendation is being made to the Commissioner of Internal Revenue that your income tax returns for these years be accepted as filed."

Taxpayer's return for the calendar year 1924 claimed as a deduction on account of taxes, at line 16 of page 1 of the return, the sum of $16,054.01. In schedule (e), page 2 of said return, said taxes were itemized. They included the following entry:

> "City, state and county taxes on real estate and personal property $11,343.51."

XV.

Balance sheets attached to or included in plaintiff's federal income tax returns for the calendar years 1923 through 1928 disclose that the land and buildings accounts increased as follows:

Date	Land	Buildings (Before Depreciation)
1/1/23	$203,614.27*	
1/1/24	286,999.65*	
1/1/25	224,317.50	$176,786.18
1/1/26	314,247.50	266,053.71
1/1/27	338,073.54	337,778.03
1/1/28	488,073.54	417,949.50
1/1/29	608,073.54	417,287.29

*Includes buildings.

XVI.

Plaintiff's federal income and personal holding company returns for the calendar years 1944 and 1945 were examined by the Commissioner of Internal Revenue acting through the Internal Revenue Agent in Charge, Los Angeles, California. Upon said examination it was determined by said Commissioner of Internal Revenue that plaintiff could not include the taxes, escrow fees, recording costs, and other related expenses hereinabove specified in the basis (unadjusted) of properties sold in 1944 and 1945. Said amounts were excluded from the basis (unadjusted) of said properties by said Commissioner.

XVII.

As a result of the determinations described in the immediately preceding paragraph XVI, said Commissioner of Internal Revenue assessed additional income taxes against plaintiff in the amounts of $162.01 for the calendar year 1944 and $1,021.24 for the calendar year 1945. In addition, said Commissioner assessed additional personal holding company surtax against plaintiff in the amount of $4,479.70 for the calendar year 1944.

XVIII.

On or about September 16, 1947, plaintiff paid to the Collector of Internal Revenue for the Sixth District of California at Los Angeles, California, all of said amounts assessed as described in the immediately preceding paragraph XVII, the total of

said assessments paid being $5,662.95, together with interest thereon.

XIX.

On or about September 6, 1949, plaintiff filed with the Collector of Internal Revenue for the Sixth District of California, at Los Angeles, California, claims for refund of taxes for the [36] calendar years 1944 and 1945 in the following amounts:

Year	Type of Tax	Amount
1944—	Income tax	$ 145.63
	(plus interest from March 15, 1945)	
1944—	Personal Holding Company Surtax	$3,264.41
	(plus interest from March 15, 1945)	
1945—	Income tax	$1,021.24
	(plus interest from March 15, 1946)	

XX.

On or about July 10, 1950, the Commissioner of Internal Revenue mailed to plaintiff by registered mail a notice of disallowance of said claims for refund and each of them.

XXI.

Plaintiff's complaint herein for recovery of said taxes was filed on July 25, 1950.

Dated: March 18, 1952.

Respectfully submitted,

LATHAM & WATKINS,

By /s/ AUSTIN H. PECK, JR.,

Attorneys for Plaintiff.

WALTER S. BINNS,
United States Attorney.

E. H. MITCHELL, and
EDWARD R. McHALE,
Ass't U. S. Attorneys.

EUGENE HARPOLE,
FRANK W. MAHONEY,
Special Attorneys, Bureau of Internal Revenue;

By /s/ EDWARD R. McHALE,
Attorneys for Defendant.

[Endorsed]: Filed April 7, 1952. [37]

[Title of District Court and Cause.]

MINUTES OF THE COURT—AUGUST 15, 1952

Present: The Honorable Peirson M. Hall,
District Judge.

Proceedings: The court having heretofore taken this case under submission;

It Is Ordered That judgment be entered for the plaintiff and counsel for the plaintiff is ordered to prepare findings, etc., and judgment for the signature of the court.

EDMUND L. SMITH,
Clerk,

By FRANCIS E. CROSS,
Deputy Clerk. [38]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The parties in the above-entitled cause, having submitted this matter upon a written Stipulation of Facts and written briefs, and said facts and briefs having been carefully considered by the Court, the Court makes the following Findings of Fact and Conclusions of Law.

Findings of Fact

I.

Plaintiff is a corporation duly organized and operating under the laws of the State of California. It maintains its principal place of business in Los Angeles, California.

II.

Plaintiff filed its federal income tax return, Treasury Department form 1120, and its federal personal holding company return, Treasury Department form 1120H, for the calendar year 1944 in the office of the Collector of Internal Revenue for the Sixth District of California at Los Angeles, California. Plaintiff filed [39] its federal income tax return, Treasury Department form 1120, for the calendar year 1945 in the office of said Collector. Each of said returns was filed within the time prescribed therefor by the applicable provisions of the Internal Revenue Code.

III.

On March 21, 1924, plaintiff purchased the real property at 5001 North Figueroa Street, Los Angeles, California, being the Southwesterly 107 feet of the Northwesterly 125 feet of the Southeasterly 139 feet of Lot 1 of the Subdivision of Highland Park Tract as per map recorded in Book 5, Page 145, of Miscellaneous Records of Los Angeles County. At the time of said purchase, said real property was subject to the lien for real property taxes for the fiscal year July 1, 1924, to June 30, 1925. Said taxes were paid by plaintiff as follows:

Date Paid	Character of Payment	Amount
11/29/24	1924 Taxes—1st inst.	$253.72
4/24/25	1924 Taxes—2nd inst.	$253.71
	Total	$507.43

IV.

Plaintiff sold the real property described in paragraph III hereof on or about May 3, 1944. In computing its loss resulting from said sale, plaintiff included in the basis (unadjusted) of said property said sum of $507.43.

V.

On May 5, 1927, plaintiff purchased the real property at 707 East Seventh Street, Los Angeles, California, being a tract of land bounded Northerly by Block 22 of Wolfskill Orchard Tract, Easterly by Towne Avenue, Southerly by Seventh Street, and Westerly by Crocker Street in the City Lands

of Los Angeles as per map recorded in Book 2, pages 504, 505 of Miscellaneous Records of Los Angeles County. At the time of said purchase, said real property was subject to the lien for real property taxes for the fiscal [40] year July 1, 1927, to June 30, 1928; and in addition, plaintiff paid the seller a pro rata share of the taxes on said property applicable to the fiscal year July 1, 1926, to June 30, 1927. Other costs of said purchase were the buyer's escrow fee and the fee for recording the deed. Said taxes and other costs were paid by plaintiff as follows:

Date Paid	Character of Payment	Amount
5/ 6/27	—Buyer's escrow fee	$ 5.00
5/ 6/27	—Recording deed	1.00
5/ 6/27	—1926 pro rata taxes	413.37
11/30/27	—1927 Taxes—1st inst.	1,333.51
4/26/28	—1927 Taxes—2nd inst.	1,333.49
	Total	$3,086.37

VI.

Plaintiff sold the real property described in paragraph V hereof on or about May 31, 1944. In computing its loss resulting from said sale, plaintiff included in the basis (unadjusted) of said property said sum of $3,086.37.

VII.

On September 29, 1926, plaintiff purchased the real property at 3320 Whittier Boulevard, Los Angeles, California, being Lots 4, 5, and 6 of La

Rosa Terrace as per map recorded in Book 22, Page 160 of Maps, Records of Los Angeles County. At the time of said purchase, said real property was subject to the lien for real property taxes for the fiscal year July 1, 1926, to June 30, 1927. Other costs of said purchase were the buyer's fee for recording the deed. Said taxes and other costs were paid by plaintiff as follows:

Lot	Date Paid	Character of Payment	Amount
4	12/ 2/26—1926	Taxes—1st inst.	$ 43.15
5	12/ 2/26—1926	Taxes—1st inst.	43.93
6	12/ 2/26—1926	Taxes—1st inst.	58.05
4	4/20/27—1926	Taxes—2nd inst.	43.13
5	4/20/27—1926	Taxes—2nd inst.	43.91
6	4/20/27—1926	Taxes—2nd inst.	58.05
		Recording deed	(.60)
		Total	$289.62

VIII.

Plaintiff sold the real property described in paragraph VII hereof on or about April 12, 1944. In computing its loss resulting from said sale, plaintiff included in the basis (unadjusted) of said property said sum of $289.62.

IX.

On September 13, 1923, plaintiff purchased the real property at 4927 South Vermont Avenue, Los Angeles, California, being Lots 5 and 6, Block 24, Vermont Avenue Square, as per map recorded in Book 11, Page 33 of Maps, Records of Los Angeles

County. At the time of said purchase, said real property was subject to the lien for real property taxes for the fiscal year July 1, 1923, to June 30, 1924. Said taxes were paid by plaintiff as follows:

Date Paid	Character of Payment	Amount
11/30/23	1923 Taxes—1st inst.	$149.35
4/25/24	1923 Taxes—2nd inst.	149.32
	Total	$298.67

X.

Plaintiff sold the real property described in paragraph IX hereof on or about April 19, 1945. In computing its gain resulting from said sale, plaintiff included in the basis (unadjusted) of said property said sum of $298.67.

XI.

On May 3, 1928, plaintiff acquired the real property at the Southeast Corner of Wilshire Boulevard and McCarty Drive, Beverly Hills, California, being Lots 3, 4 and 5, Tract 6648, as [42] per map recorded in Book 71, Page 48 of Maps, Records of Los Angeles County. At the time of said purchase, said real property was subject to the lien for real property taxes for the fiscal year July 1, 1928, to June 30, 1929. In addition, plaintiff paid the seller a pro rata share of the taxes and lighting assessments on said property applicable to the fiscal year July 1, 1927, to June 30, 1928. Other costs were escrow fees, commission paid, title policy fee, and cost of drawing and recording deed. As a part

of said acquisition plaintiff exchanged a lot in Highland Park, California; said lot, when purchased by plaintiff, was subject to the lien for real property taxes for the fiscal year July 1, 1923, to June 30, 1924. In addition, an escrow fee was incurred in connection with such purchase; and an improvement assessment was later paid. All of the taxes and other costs above described were paid by the plaintiff as follows:

Date Paid	Character of Payment	Amount
1/19/24	Escrow fee on Highland Park Lot	$ 6.20
1/19/24	1923 Taxes on Highland Park Lot	63.00
2/14/27	Assessment, Arroyo #1, Improvement District, on Highland Park Lot	40.30
5/11/28	Commission to Beverly Hills Realty Co.	2,000.00
5/11/28	Pro rata 1927 taxes paid to vendor	183.37
5/11/28	Pro rata 1928 lighting assessment paid to vendor	82.08
5/11/28	Title Policy fee	80.50
5/11/28	Escrow fee	30.00
5/11/28	Drawing & recording deed	3.20
11/28/28	1928 Taxes—1st inst.	1,013.68
4/24/29	1928 Taxes—2nd inst.	1,013.68
	Total	$4,516.01

XII.

Plaintiff sold the real property described above in paragraph [43] XI on or about April 19, 1945. In computing its gain resulting from said sale, plaintiff included in the basis (unadjusted) of said property said sum of $4,516.01.

XIII.

The amounts so included in basis (unadjusted) of the several properties sold as above described had been deducted by plaintiff from gross income in the years in which paid in determining plaintiff's net income subject to tax for said years. Said deductions resulted in tax benefits to plaintiff in said years of payment in the total amount of $1,070.52. Of said total benefit, $500.45 was realized by plaintiff by reason of deduction of the items hereinabove described applicable to the parcels sold in 1944; and the balance of $570.07 was the result of the deductions of the items hereinabove described attributable to the parcels sold in 1945.

XIV.

Field and/or office audits of plaintiff's federal income tax returns for the calendar years 1923, 1924, 1925, 1926, 1927, 1928 and 1929 were made by the Office of the Internal Revenue Agent in Charge at Los Angeles, California, and written reports of the audits covering the years 1923, 1926, 1927 and 1929 and the period January 1 to June 30, 1928, were submitted to plaintiff. None of said reports disallowed or otherwise adjusted any of the deduc-

tions, or any portion thereof, taken by plaintiff as hereinabove described. The following statements are quoted from said reports:

(a) Report of Revenue Agent Carl E. Siegmund, dated January 6, 1927, covering plaintiff's return for the calendar year 1923:

> "Compensation of officers, interest, taxes and general expenses for 1923 were verified with the records available, and outside of some corrections as to general expenses, were found correct as reported." [44]

(b) Report of Revenue Agent Claude A. Dewey, dated December 13, 1929, covering plaintiff's return for the calendar year 1927:

> "The examining officer has accepted the depreciation rates and amounts claimed per the returns filed. Haskins & Sells audit for 1927 disclosed retirements based on assets exhausted and the net assets after these adjustments appear substantially correct.
>
> "Complete co-operation was given the examiner by this taxpayer and his (sic) accountants."

(c) Report of Revenue Agent R. M. Allan, dated February 20, 1930, covering plaintiff's return for the six months period ended June 30, 1928:

> "The additions to the land account during the year amounted to $120,000 representing the cash payment in connection with the exchange of vacant property in Highland Park for three lots in Beverly Hills."

(d) Report of Revenue Agent George W. Givan, dated December 16, 1931, covering the calendar year 1929:

> "On February 24, 1930, the Franchise Tax Commissioner of the State of California proposed a deficiency in tax of $2,871.07 due and payable as of May 15, 1929, and September 15, 1929. The taxpayer protested this amount on May 14, 1930, and agreed to the payment of an additional amount of $400.22 on June 10, 1930. The difference of $2,470.85 was credited to surplus in 1930.
>
> "The taxpayer adjusted its books in 1929 by debiting State franchise taxes paid and crediting accounts payable in the amount of $2,871.07. Since this amount was only a contingent liability on December 31, 1929, the taxpayer may only deduct in 1929 the amount of the actual liability in 1929 which was determined to be $400.22. The difference [45] of $2,470.85 is to be restored to income for the year 1929."

(e) On September 15, 1927, plaintiff received a letter from the Internal Revenue Agent in Charge in Los Angeles, California, covering the years 1924 and 1925, which letter stated as follows:

> "Upon the basis of information received, recommendation is being made to the Commissioner of Internal Revenue that your income tax returns for these years be accepted as filed."

Taxpayer's return for the calendar year 1924 claimed as a deduction on account of taxes, at line 16 of page 1 of the return, the sum of $16,054.01. In schedule (e), page 2 of said return, said taxes were itemized. They included the following entry:

"City, state and county taxes on real estate and personal property $11,343.51."

XV.

Balance sheets attached to or included in plaintiff's federal income tax returns for the calendar years 1923 through 1928 disclose that the land and buildings accounts increased as follows:

Date	Land	Buildings (Before Depreciation)
1/1/23	$203,614.27*	
1/1/24	286,999.65*	
1/1/25	224,317.50	$176,786.18
1/1/26	314,247.50	266,053.71
1/1/27	338,073.54	337,778.03
1/1/28	488,073.54	417,949.50
1/1/29	608,073.54	417,287.29

*Includes buildings. [46]

XVI.

Plaintiff's federal income and personal holding company returns for the calendar years 1944 and 1945 were examined by the Commissioner of Internal Revenue, acting through the Internal Revenue Agent in Charge, Los Angeles, California. Upon said examination it was determined by said Commisisoner of Internal Revenue that

plaintiff could not include the taxes, escrow fees, recording costs, and other related expenses hereinabove specified in the basis (unadjusted) of properties sold in 1944 and 1945. Said amounts were excluded from the basis (unadjusted) of said properties by said Commissioner.

XVII.

As a result of the determinations described in the immediately preceding paragraph XVI, said Commissioner of Internal Revenue assessed additional income taxes against plaintiff in the amounts of $162.01 for the calendar year 1944 and $1,021.24 for the calendar year 1945. In addition, said Commissioner assessed additional personal holding company surtax against plaintiff in the amount of $4,479.70 for the calendar year 1944.

XVIII.

On or about September 16, 1947, plaintiff paid to the Collector of Internal Revenue for the Sixth District of California at Los Angeles, California, all of said amounts assessed as described in the immediately preceding paragraph XVII, the total of said assessments paid being $5,662.95, together with interest thereon.

XIX.

On or about September 6, 1949, plaintiff filed with the Collector of Internal Revenue for the Sixth District of California, at Los Angeles, California, claims for refund of taxes for the calendar years 1944 and 1945 in the following amounts:

Year	Type of Tax	Amount
1944—	Income tax	$145.63
	(plus interest from March 15, 1945)	
1944—	Personal Holding Company Surtax	$3,264.41
	(plus interest from March 15, 1945)	
1945—	Income Tax	$1,021.24
	(plus interest from March 15, 1946)	

XX.

On or about July 10, 1950, the Commissioner of Internal Revenue mailed to plaintiff by registered mail a notice of disallowance of said claims for refund and each of them.

XXI.

Plaintiff's complaint herein for recovery of said taxes was filed on July 25, 1950.

Conclusions of Law

I.

Both the plaintiff and the Commissioner of Internal Revenue clearly made a mistake of law when the deductions referred to in paragraphs III, V, VII, IX and XI of the foregoing Findings of Fact were made and allowed, after audit by the Commissioner of Internal Revenue.

II.

The statute of limitations has long since run against the defendant with respect to any attempt to collect the tax attributable to the wrongly de-

ducted items enumerated in said paragraphs III, V, VII, IX and XI of the foregoing Findings of Fact.

III.

Sections 3770(a)(2) and 3775(a) of the Internal Revenue Code preclude any attempt by the defendant to collect the tax attributable to said wrongfully deducted items after the statute of limitations has run, by offset, counterclaim or [48] recoupment.

IV.

Plaintiff was not estopped from including said wrongfully deducted items in the basis (unadjusted) of the properties to which they related in measuring gain or loss realized on sale of said properties in 1944 and 1945.

V.

Plaintiff has overpaid its federal income tax and personal holding company surtax, with interest thereon, for the calendar year 1944 in the amount of $3,921.55, and its federal income tax, with interest thereon, for the calendar year 1945 in the amount of $1,113.15.

VI.

Claims for refund were duly filed by plaintiff for the recovery of said taxes and interest overpaid as aforesaid within the time prescribed by law. Said claims for refund having been denied by defendant, this action for recovery of said overpayments, together with interest thereon, was timely filed.

VII.

Plaintiff is entitled to recover from defendant the amount of $5,034.70, together with interest thereon at the rate of six per cent per annum from September 16, 1947, to a date preceding by not more than thirty days the date of the refund check in payment thereof.

Dated: Oct. 7th, 1952.

/s/ PEIRSON M. HALL,
District Court Judge.

Approved as to Form:

WALTER S. BINNS,
United States Attorney;

E. H. MITCHELL, and
EDWARD R. McHALE,
Ass't U. S. Attorneys;

EUGENE HARPOLE, and
FRANK W. MAHONEY,
Special Attorneys, Bureau of Internal Revenue.

By /s/ EDWARD R. McHALE.

[Endorsed]: Filed Oct. 7, 1952. [49]

In the District Court of the United States in and for the Southern District of California, Central Division

No. 11960-PH

THE ALBERTSON COMPANY, a Corporation,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

JUDGMENT FOR PLAINTIFF FOR FEDERAL INCOME TAX AND PERSONAL HOLDING COMPANY SURTAX OVERPAID

Plaintiff herein having filed its complaint for recovery of federal income tax and personal holding company surtax overpaid for the calendar years 1944 and 1945 in the total amount of $4,431.28, plus interest thereon as provided by law; the defendant having filed its answer to said complaint; the parties having submitted a complete written Stipulation of Facts and written briefs in support of their respective contentions; the Court having entered herein its Findings of Fact and Conclusions of Law wherein it is found that plaintiff is entitled to recover the full amount prayed for in its complaint.

It Is, Therefore, Ordered, Adjudged and Decreed that plaintiff recover from defendant on account of federal income taxes overpaid for the calendar years 1944 and 1945, and personal holding company surtax overpaid for the calendar year 1944, the sum

of $5,034.70, together with interest thereon at the rate of six per cent per annum from September 16, 1947, to a date preceding by not more [50] thirty days the date of the refund check in payment thereof.

Dated: Oct. 7th, 1952.

/s/ PEIRSON M. HALL,
District Court Judge.

Approved as to Form:

WALTER S. BINNS,
United States Attorney;

E. H. MITCHELL, and
EDWARD R. McHALE,
Ass't U. S. Attorneys;

EUGENE HARPOLE, and
FRANK W. MAHONEY,
Special Attorneys, Bureau of Internal Revenue.

By /s/ EDWARD R. McHALE.

[Docketed and entered]: Oct. 8, 1952.

[Endorsed]: Filed Oct. 7, 1952. [51]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

Notice Is Hereby Given that the defendant, United States of America, hereby appeals to the Court of Appeals for the Ninth Circuit from the final judgment in the above-entitled case against defendant and in favor of plaintiff, which judgment was entered October 8, 1952.

Dated: December 5, 1952.

WALTER S. BINNS,
United States Attorney;

E. H. MITCHELL, and
EDWARD R. McHALE,
Ass't U. S. Attorneys;

EUGENE HARPOLE, and
FRANK W. MAHONEY,
Special Attorneys, Bureau of Internal Revenue.

/s/ EDWARD R. McHALE,
Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Dec. 5, 1952. [52]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

The defendant, United States of America, hereby states that it intends to rely on appeal on the following points:

1. The District Court erred in adopting the ruling entered in its minutes August 15, 1952.

2. The District Court erred in adopting the findings of fact and conclusions of law filed October 7, 1952.

3. The District Court erred in adopting the judgment, docketed and entered on October 8, 1952.

Dated: February 24, 1953.

WALTER S. BINNS,
United States Attorney;

E. H. MITCHELL, and
EDWARD R. McHALE,
Ass't U. S. Attorneys;

EUGENE HARPOLE, and
FRANK W. MAHONEY,
Special Attorneys, Bureau of Internal Revenue.

/s/ EDWARD R. McHALE,
Attorneys for Defendant-Appellant.

[Endorsed]: Filed Feb. 24, 1953. [54]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

The defendant, United States of America, designates the complete record and all the proceedings

and evidence included in the record on appeal, as follows:

1. Complaint and Summons, dated July 26, 1950;

2. Stipulation and Order Extending Time to Appear, dated October 4, 1950;

3. Stipulation and Order Extending Time to Appear, dated December 5, 1950;

4. Stipulation and Order Extending Time to Appear, dated January 15, 1951;

5. Answer of Defendant, United States of America, filed February 14, 1951;

6. Stipulation of Facts, filed April 7, 1952;

7. Minutes of the Court, dated August 15, 1952;

8. Findings of Fact and Conclusions of Law, filed October 7, 1952; [55]

9. Judgment for plaintiff for Federal Income Tax and Personal Holding Company Surtax Overpaid, filed October 7, 1952, docketed and entered October 8, 1952;

10. Notice of Appeal to the Court of Appeals for the Ninth Circuit, filed December 5, 1952;

11. Order Extending Time to Docket Cause on Appeal, dated and filed January 13, 1953;

12. Statement of Points on Appeal; and

13. This Designation of Contents of Record on Appeal.

Dated: This 24th day of February, 1953.

WALTER S. BINNS,
United States Attorney;

E. H. MITCHELL, and
EDWARD R. McHALE,
Ass't U. S. Attorneys;

EUGENE HARPOLE, and
FRANK W. MAHONEY,
Special Attorneys, Bureau of Internal Revenue.

/s/ EDWARD R. McHALE,
Attorneys for Defendant-Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Feb. 24, 1953. [56]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET CAUSE ON APPEAL

Upon motion of defendant-appellant, and good cause appearing therefor:

It Is Hereby Ordered that the time within which to file the record and docket the above-entitled cause in the United States Court of Appeals for the Ninth

Circuit be, and the same is hereby, extended to and including the 5th day of March, 1953.

Dated: This 13th day of January, 1953.

/s/ LEON R. YANKWICH,
United States District Judge.

Presented by:

/s/ EDWARD R. McHALE,
Asst. United States Attorney.

Affidavit of service by mail attached.

[Endorsed]: Filed Jan. 13, 1953. [58]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 59, inclusive, contain the original Complaint for Refund of Income Taxes and Personal Holding Company Surtax; Summons; Three Stipulations and Orders Extending Time to Appear; Answer; Stipulation of Facts; Findings of Fact and Conclusions of Law; Judgment for Plaintiff for Federal Income Tax and Personal Holding Company Surtax Overpaid; Notice of Appeal; Statement of Points on Appeal; Designation of Record on Appeal and Order Extending Time to Docket Appeal and a full, true and correct copy of

Minutes of the Court for August 15, 1952, which constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 3rd day of March, A.D. 1953.

[Seal] EDMUND L. SMITH,
Clerk.

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 13,734. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. The Albertson Company, a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed March 4, 1953.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

The United States Court of Appeals
for the Ninth Circuit

No. 13,734

UNITED STATES OF AMERICA,

Appellant,

vs.

THE ALBERTSON COMPANY, a Corporation,

Appellee.

APPELLANT'S DESIGNATION OF RECORD NECESSARY FOR CONSIDERATION ON APPEAL AND TO BE PRINTED

Pursuant to Rule 19 (6) of this Court, appellant hereby designates the following parts of the record as being necessary for consideration of the points upon which it intends to rely on this appeal, and desires to have printed, omitting the title of Court and cause from each of the documents designated for printing:

1. The complete record certified by the Clerk of the District Court to the Court of Appeals [pages 1-58].

2. The District Court Clerk's certification of Record on Appeal.

3. This Designation of Record Necessary for Consideration on Appeal and to be Printed.

4. Statement of Points Upon Which Appellant Intends to Rely on Appeal [Court of Appeals].

Dated: This 6th day of March, 1953.

WALTER S. BINNS,
United States Attorney.

E. H. MITCHELL and
EDWARD R. McHALE,
Assts. United States Attorney.

/s/ EDWARD R. McHALE,
Attorneys for Appellant.

Affidavit of service by mail attached.

[Endorsed]: Filed March 7, 1953.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY ON APPEAL

Pursuant to the provisions of Rule 19 (6) of the Rules of the United States Court of Appeals for the Ninth Circuit, appellant hereby adopts its Statement of Points on Appeal, which was filed in the District Court, as its statement of the points upon which it intends to rely in this Court.

Dated: This 6th day of March, 1953.

WALTER S. BINNS,
United States Attorney.

E. H. MITCHELL and
EDWARD R. McHALE,
Assts. United States Attorney.

/s/ EDWARD R. McHALE,
Attorneys for Appellant.

Affidavit of service by mail attached.

[Endorsed]: Filed March 7, 1953.

No. 13734

United States
Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,

vs.

THE ALBERTSON COMPANY, a Corporation,
Appellee.

Supplemental
Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—8-28-53

No. 13734

United States
Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,

vs.

THE ALBERTSON COMPANY, a Corporation,
Appellee.

Supplemental
Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—8-28-53

United States District Court for the Southern District of California, Central Division

Civil No. 11960-PH

THE ALBERTSON COMPANY, a Corporation,
Plaintiff-Appellee,

vs.

UNITED STATES OF AMERICA,
Defendant-Appellant.

STIPULATION FOR DESIGNATION, CERTIFICATION AND TRANSMITTAL OF SUPPLEMENTAL RECORD ON APPEAL

(Fed. R. Civ. P. 75(h))

It Is Hereby Stipulated by and between the parties hereto, through their respective counsel of record, as follows:

1. That a Minute Order of Court dated August 15, 1952, prepared by the Court and mailed to counsel at that time, did not then become a part of records of the Court, but that by Minute Order dated May 13, 1953, the Court entered said Minute Order nunc pro tunc August 15, 1952.

2. The Minute Order entered nunc pro tunc August 15, 1952, was not included in the original Designation of Record on Appeal, or certified or transmitted to the Court of Appeals.

3. Defendant-Appellant, United States of America, hereby designates as supplemental record on appeal the minutes of Court dated May 13, 1953,

which includes the Minute Order entered nunc pro tunc August 15, 1952, and this Stipulation.

4. Pursuant to Federal Rule of Civil Procedure 75(h), the Clerk is requested to certify and transmit to the Court of Appeals the supplemental record on appeal designated herein by defendant-appellant.

Dated: This 15th day of May, 1953.

WALTER S. BINNS,
United States Attorney;

E. H. MITCHELL, and
EDWARD R. McHALE,
Assistant U.S. Attorneys;

EUGENE HARPOLE,
Special Attorney, Bureau of Internal Revenue;

/s/ EDWARD R. McHALE,
Attorneys for Defendant-Appellant.

LATHAM & WATKINS,

By /s/ JUSTIN H. PECK, JR.,
Counsel for Plaintiff-Appellee.

[Title of District Court and Cause.]

MINUTES OF THE COURT—MAY 13, 1953,
NUNC PRO TUNC 8/15/52

Proceedings: Good cause appearing therefor, It Is by the Court Ordered that the minute order of the Court, prepared by Judge Hall and dated Aug. 15, 1952, at Los Angeles, Calif., copies of which were mailed to counsel at that time, be entered in the minutes of this court, nunc pro tunc, August 15, 1952, which minute order is as follows, to wit:

"United States District Court, Southern District of California, Central Division
"No. 11,960-PH-Civil

"THE ALBERTSON COMPANY, a Corporation,
"Plaintiff,

"vs.

"UNITED STATES OF AMERICA,
"Defendant.

"MINUTES OF THE COURT DATE:
"AUG. 15, 1952

"At: Los Angeles, Calif.

"Present: The Hon. Peirson M. Hall,
District Judge;
"Deputy Clerk: Francis E. Cross.

"Proceedings: Filed Stipulation of Facts.

"Ruling: The copies of briefs filed have been helpful, but the questions appear to me to be simple.

"Both the taxpayer and the Commissioner of Internal Revenue clearly made a mistake of law

when the deductions were made and allowed after audit by the Internal Revenue Bureau, for the years 1923-1928. Magruder v. Supplee, (1942), 316 U.S. 394. It is equally clear that the statute of limitations has long since run against the Commissioner of Internal Revenue to attempt to collect those wrongly deducted items. And Sections 3770(a)(2) and 3775(a) are also clear in precluding any attempt by the Commissioner of Internal Revenue to collect those wrongfully deducted items after the statute of limitations has run. Judgment will, therefore, be for the plaintiff, who will prepare Findings and Judgment under the rules."

[Seal] EDMUND L. SMITH,
Clerk.
FRANCIS E. CROSS,
Deputy Clerk.

A True Copy May 25, 1953.

[Endorsed]: No. 13734. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. The Albertson Company, a Corporation, Appellee. Supplemental Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed May 27, 1953.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

No. 13734.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

THE ALBERTSON COMPANY, a Corporation,

Appellee.

On Appeal From the United States District Court for the Southern District of California.

BRIEF FOR THE UNITED STATES.

H. BRIAN HOLLAND,
Assistant Attorney General.
ELLIS N. SLACK,
A. F. PRESCOTT,
HARVEY M. SPEAR,
Special Assistants to the Attorney General.

WALTER S. BINNS,
United States Attorney.
E. H. MITCHELL,
EDWARD R. McHALE,
Assistant United States Attorneys.
600 Federal Building,
Los Angeles 12, California.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Miscellaneous

STATUTES

No. 13734.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

THE ALBERTSON COMPANY, a Corporation,

Appellee.

On Appeal From the United States District Court for the Southern District of California.

BRIEF FOR THE UNITED STATES.

Opinion Below.

The District Court wrote no formal opinion in this case.

Jurisdiction.

This appeal involves federal income and personal holding company taxes for the years 1944 and 1945. The taxes in dispute were paid on or about September 16, 1947. Claims for refund were filed on or about September 6, 1949, and were rejected by notice dated July 10, 1950. Within the time provided in Section 3772 of the Internal Revenue Code and on July 25, 1950, the taxpayer brought an action in the District Court for recovery of the taxes paid. [R. 41-42.] Jurisdiction was conferred on the District Court by 28 U. S. C., Section 1346. The judgment was entered on October 8, 1952.

[R. 58-59.] Within sixty days and on December 5, 1952, a notice of appeal was filed. [R. 60.] Jurisdiction is conferred on this Court by 28 U. S. C., Section 1291.

Question Presented.

Whether, in determining gain under Section 111 of the Internal Revenue Code on the sale of certain real property in 1944 and 1945, the taxpayer may include in the "adjusted basis" of such property within the meaning of Section 113(b) certain taxes and other charges, which were paid by the taxpayer when it purchased the property in 1923 through 1928, and for which the taxpayer took deductions on its tax returns which were allowed by the Commissioner in determining the taxpayer's taxable net income for such prior years.

Statute Involved.

INTERNAL REVENUE CODE:

SEC. 111. DETERMINATION OF AMOUNT OF, AND RECOGNITION OF, GAIN OR LOSS.

(a) *Computation of Gain or Loss.*—The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 113(b) for determining gain, and the loss shall be in excess of the adjusted basis provided in such section for determining loss over the amount realized.

(b) *Amount Realized.*—The amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money) received.

(c) *Recognition of Gain or Loss.*—In the case of a sale or exchange, the extent to which the gain or loss determined under this section shall be recognized

for the purposes of this chapter, shall be determined under the provisions of section 112.

* * * * * * * *

(26 U. S. C., 1946 ed., Sec. 111)

SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Basis (Unadjusted) of Property.*—The basis of property shall be the cost of such property, except that—

* * * * * * * *

(b) *Adjusted Basis.*—The adjusted basis for determining the gain or loss from the sale or other disposition of property, whenever acquired, shall be the basis determined under subsection (a), adjusted as hereinafter provided.

(1) *General Rule.*—Proper adjustment in respect of the property shall in all cases be made—

(A) [as amended by Sec. 130(b), Revenue Act of 1942, c. 619, 56 Stat. 798.] For expenditures, receipts, losses, or other items, properly chargeable to capital account, but no such adjustment shall be made for taxes or other carrying charges for which deductions have been taken by the taxpayer in determining net income for the taxable year or prior taxable years;

* * * * * * * *

(26 U. S. C., 1946 Ed., Sec. 113.)

Statement.

The facts in this case were stipulated. [R. 31-42.]

The Albertson Company (hereinafter referred to as taxpayer) is a corporation organized under the laws of the State of California and maintaining its principal

place of business in Los Angeles. During 1923, 1924, 1926, 1927 and 1928, the taxpayer purchased, or otherwise acquired, certain real property in Los Angeles and in Beverly Hills, California. At the time of acquisition, each of the properties were subject to a lien for real property taxes. In acquiring the property the taxpayer incurred additional costs in connection therewith such as escrow fees, deed recording fees, lighting assessments, commissions, title policy fees, and improvement assessments. The taxes and other charges were paid by the taxpayer at or after the respective dates of acquisition of the properties. [R. 31-36.]

In computing its federal income taxes for the years involved, the taxpayer deducted the above-mentioned payments from its gross income and such deductions were allowed by the Commissioner of Internal Revenue with tax benefits resulting to the taxpayer. [R. 37.]

In 1944 and 1945, the taxpayer sold the real property purchased between 1923 and 1928. [R. 32-37.] In determining the "adjusted basis" of such property, the taxpayer included all of the above-mentioned taxes, escrow fees, deed recording fees, lighting assessments, commissions, title policy fees and improvement assessments. [R. 4.] Upon examination of the taxpayer's corporation income and personal holding company tax returns for 1944 and 1945, the Commissioner of Internal Revenue determined that the taxpayer could not include the above-mentioned items in the "adjusted basis" of the property sold during 1944 and 1945, and assessed additional income taxes and personal holding company surtaxes against the taxpayer for such years in the total amount of $5,662.95, together with interest thereon. The taxpayer paid the assessments, filed claims for refund and, upon the disallowance thereof, brought this action for their recovery. [R. 41-42.]

Statement of Points to Be Urged.

1. The District Court erred in adopting the ruling entered in its minutes August 15, 1952. (Appendix, *infra.*)

2. The District Court erred in adopting the findings of fact and conclusions of law filed October 7, 1952. [R. 44-57.]

3. The District Court erred in adopting the judgment, docketed and entered on October 8, 1952. [R. 58-59.]

Summary of Argument.

In computing the "adjusted basis" of property under Section 113(b)(1)(A) of the Code, the *but* clause of subsection (A) expressly precludes the inclusion of taxes and other charges which have been previously deducted in computing taxable net income for prior years. In this case the taxpayer seeks to include in the "adjusted basis" of property sold in 1944 and 1945 the taxes and other charges for which it took deductions which the Commissioner of Internal Revenue allowed for the years 1923 through 1928. The charges other than taxes which the taxpayer deducted in the earlier years were rightfully deducted by the taxpayer, and the taxes were deducted by the taxpayer and allowed by the Commissioner under color of right and under what was then believed to be the applicable law. The taxes and other charges which the taxpayer claims as adjustments under Section 113 (b)(1)(A) in this case represent the "equivalent" of double deductions, which are expressly prohibited by the statute and the applicable Treasury Regulations, and which Congress, the Supreme Court, and the Tax Court have continuously sought to prevent.

ARGUMENT.

In Determining the Gain on the Sale of Certain Real Property in 1944 and 1945, the "Adjusted Basis" of the Property Should Not Include Taxes and Other Charges, Which Were Paid by the Taxpayer When It Purchased the Property in 1923 Through 1928 and for Which the Taxpayer Took Deductions on Its Tax Returns Which Were Allowed by the Commissioner in Determining the Taxpayer's Taxable Net Income for Such Prior Years.

Section 111 of the Internal Revenue Code, *supra,* provides that the gain or loss on the sale or other disposition of property shall be the excess of the amount realized therefrom over the "adjusted basis" as computed under Section 113(b), *supra.* The applicable provisions of Section 113(b) are as follows:

> (b) *Adjusted Basis.*—The adjusted basis for determining the gain or loss from the sale of other disposition of property, whenever acquired, shall be the basis determined under subsection (a), adjusted as hereinafter provided.
>
> (1) *General Rule.*—Proper adjustment in respect of the property shall in all cases be made—
>
> (A) For expenditures, receipts, losses, or other items, properly chargeable to capital account, *but no such adjustment shall be made for taxes or other carrying charges for which deductions have been taken by the taxpayer in determining net income for the taxable year or prior taxable years;* * * * (Italics supplied.)

The taxpayer in this case seeks to include in the property's "adjusted basis" under subsection (A) the taxes and

other charges paid and deducted from taxable net income from 1923 through 1928.

Adjustments and deductions such as the taxpayer here seeks are matters of legislative grace. *Helvering v. Ind. Life Ins. Co.,* 292 U. S. 371, 381; *New Colonial Co. v. Helvering,* 292 U. S. 435, 440. The Supreme Court has noted that, in granting such adjustments and deductions, Congress is opposed to double deductions for any given expenditure or charge. *Ilfeld Co. v. Hernandez,* 292 U. S. 62, 68.

From the Congressional opposition to double deductions, it is clear that, in providing for the capitalization of certain items as part of the "adjusted basis" in Section 113(b)(1)(A), Congress did not intend to include therein those items which the taxpayer had already deducted in determining its net income for prior taxable years. This intention is unmistakeably spelled out in the last part of subsection (A), italics in the above quotation and hereinafter referred to as the *but* clause.

The *but* clause specifically precludes the taxpayer from including the taxes and other charges in the "adjusted basis" as claimed in this case. The language in the *but* clause is clear and well defined. "Language used in tax statutes should be read in the ordinary and natural sense." *Helvering v. San Joaquin Co.,* 297 U. S. 496, 499. The *but* clause is unqualified and unequivocal. A literal application of the *but* clause to this case precludes the double deduction herein claimed by the taxpayer.

The legislative history of the *but* clause shows conclusively that Congress intended the literal application of the *but* clause "to eliminate double deductions or their equivalent." Treasury Regulations 111, promulgated un-

der the Internal Revenue Code, Section 29.113(b)(1)-1. Section 113(b)(1)(A) of the Internal Revenue Code as applicable to this case first appeared in its present form in Section 113(b)(1)(A) of the Revenue Act of 1932, c. 209, 47 Stat. 169. In prior Revenue Acts, the corresponding section was contained in Section 111(b)(1) of the Revenue Act of 1928, c. 852, 45 Stat. 791, which had provided as follows:

> SEC. 111. DETERMINATION OF AMOUNT OF GAIN OR LOSS.
>
> (a) *Computation of Gain or Loss.*—
>
> * * * * * * * *
>
> (b) *Adjustment of Basis.*—In computing the amount of gain or loss under subsection (a)—
>
> (1) Proper adjustment shall be made for any expenditure, receipt, loss, or other items, properly chargeable to capital account, * * *

Under the statutory scheme of the 1928 Revenue Act, Section 111 included provisions which covered both (a) the computation of gain or loss, and (b) the adjustments to basis. Section 113, entitled "Basis for Determining Gain or Loss," defined the term "basis." In the Revenue Act of 1932, however, the section covering the "adjustment of basis" was expanded, taken out of Section 111, and included in a revised Section 113, which was redesignated "*Adjusted* Basis for Determining Gain or Loss." (Italics supplied.)

In the form in which the Revenue Act of 1932 first passed the House of Representatives, the new Section 113(b)(1)(A) merely reenacted the old provisions of Section 111(b)(1) of the 1928 Act, as follows:

SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.—

(a) *Basis (Unadjusted) of Property.*—

* * * * * * * *

(b) *Adjusted Basis.*—The adjusted basis for determining the gain or loss from the sale or other disposition of property, whenever acquired, shall be the basis determined under subsection (a), adjusted as hereinafter provided.

(1) *General Rule.*—Proper adjustment in respect of the property shall in all cases be made—

(A) for expenditures, receipts, losses, or other items, properly chargeable to capital account, * * *.

When the above section came before the Senate Finance Committee, it was suggested during the hearings that subsection (A) be modified to read as follows (Senate Hearings on Revenue Act of 1932, pp. 1390, 1393):

(A) for expenditures, receipts, losses, or other items properly chargeable to capital account, including taxes and other carrying charges on unproductive property: *Provided, however,* That no such adjustment shall be allowed for taxes or other carrying charges for which deductions have been taken by the taxpayer in determining taxable income in the same year or in prior years.

The above-suggested change was recommended at the Senate Hearings because the Commissioner of Internal Revenue on August 6, 1931, had just revoked the provisions of the Regulations which had previously provided that "carrying charges, such as taxes on unproductive property" must be capitalized in computing the adjusted

basis of property. T. D. 4321, X-2 Cum. Bull. 169 (1931), amending Article 561, Treasury Regulations 74, promulgated under the Revenue Act of 1928.[1] The above-suggested change at the Senate Hearing was adopted by the Senate but with slight modifications and was enacted

---

[1]The amendment to Article 561 was occasioned by *Central Real Estate Co. v. Commissioner,* 17 B. T. A. 776, affirmed, 47 F. 2d 1036 (C. A. 5th), which had held that Section 202(b)(1), Revenue Act of 1926, c. 27, 44 Stat. 9, which provided for the capitalization of "any expenditure or item of loss properly chargeable to capital account," did not intend to provide for the capitalization of "carrying charges, such as taxes on unproductive property," even though the applicable Regulations provided as follows (Art. 1561, Regulations 69):

> In computing the amount of gain or loss, however, the cost or other basis of the property must be increased by the cost of capital improvements and betterments made to the property since the basic date, and by carrying charges, such as taxes on unproductive property. Where the taxpayer has elected to deduct carrying charges in computing net income, or used such charges in determining his liability for filing returns of income for prior years, the cost or other basis may not be increased by such items in computing the gain or loss from the subsequent sale of the property. * * *

Identical language is contained in Article 561, Treasury Regulations 74. As a result of the *Central Real Estate Co.* case, T. D. 4321 was issued substituting for the above quotation the following new provisions:

> In computing the amount of gain or loss, however, the cost or other basis of the property shall be properly adjusted for any expenditure, receipt, loss, or other item properly chargeable to capital account, including the cost of improvements and betterments made to the property since the basic date. Carrying charges, such as interest and taxes on unproductive property, may not be treated as items properly chargeable to capital account, except in the case of carrying charges paid or incurred, as the case may be, prior to August 6, 1931, by a taxpayer who did not elect to deduct carrying charges in computing net income and did not use such charges in determining his liability for filing returns of income.

It was subsequently held, however, that the *Central Real Estate Co.* case represented a "misinterpretation of Congressional intention" and that taxes and interest on unproductive property could properly be capitalized under the 1926 Act and its pertinent Regulations. *Jackson v. Commissioner,* 172 F. 2d 605, 607 (C. A. 7th).

by Congress as part of Section 113(b)(1)(A) of the Revenue Act of 1932, in the following form:

> (A) for expenditures, receipts, losses, or other items, properly chargeable to capital account, including taxes and other carrying charges on unimproved and unproductive real property, but no such adjustment shall be made for taxes or other carrying charges for which deductions have been taken by the taxpayer in determining net income for the taxable year or prior taxable years; * * *.

When the House and Senate versions of subsection (A) went to the Conference Committee, the House agreed to the modified subsection as proposed by the Senate. The Conference Report gives us the following explanation for the Senate's amendment modification (H. Conference Rep. No. 1492, 72d Cong., 1st Sess., p. 14 (1939-1 Cum. Bull. (Part 2) 539, 542)):

> This amendment permits the taxpayer to capitalize taxes and other carrying charges on unimproved and unproductive real property, but precludes the taxpayer from capitalizing any such items for which deductions have been taken by the taxpayer or predecessors in title in determining net income for the current or any preceding year; * * *

By the time Congress had reenacted Section 113(b)(1)(A) in the Revenue Act of 1934, c. 277, 48 Stat. 680, the Secretary of the Treasury had published Regulations explaining the statutory purpose and application of the *but* clause of subsection (A) as follows (Art. 113(b)-1, Regulations 86):

> *Adjustments must always be made to eliminate double deductions or their equivalent.* * * * (Italics supplied.)

The above provision of the Regulations has remained the same during all the years since 1934 and is the same as that contained in the Regulations applicable to this case. Section 29.113(b)(1)-1, Regulations 111. The fact that the above-quoted sentence from the Regulations has reappeared in the identical language in all Regulations since 1934, during which time the *but* clause has also remained unchanged in the statute, gives Congressional approval and the force of law to the above-quoted sentence from the Regulations. *Helvering v. Winmel,* 305 U. S. 79, 83; *Morrissey v. Commissioner,* 296 U. S. 344, 355; *Coast Carton Co. v. Commissioner,* 149 F. 2d 73, 74 (C. A. 9th). The only change in Section 113(b)(1)(A) during the period between the Revenue Act of 1934 and the years involved herein was made in the Revenue Act of 1942, c. 619, 56 Stat. 798, which modified subsection (A) to be applicable to taxes and other charges even if incurred on property other than "unimproved and unproductive property."[2] The fact that the *but* clause remained in Section 113(b)(1)(A) even after the "unproductive property" clause was removed by the Revenue Act of 1942 is further evidence of the Congressional intent to prevent all double deductions "or their equivalent."

As shown above, it was the intent of Congress in enacting the *but* clause to preclude such double deductions or their equivalent. In this case, the taxpayer seeks to include as part of the "adjusted basis" of its property sold during 1944 and 1945, certain taxes and other charges which it incurred, paid and deducted from its taxable income on its federal tax returns for the years 1923

---

[2]In the Revenue Act of 1942, the following clause of Section 113(b)(1)(A) was removed: "including taxes and other charges on unimproved and unproductive real property." See H. Rep. No. 2333, 77th Cong., 2d Sess., pp. 47-48 (1942-2 Cum. Bull. 372, 410-411).

through 1928. In deducting such taxes and other charges from its income during those earlier years, the taxpayer was following the accepted practice at that time and was exercising what amounted to an election to make such deductions. The charges such as the escrow fees, deed recording fees, lighting assessments, commissions, title policy fees and improvements assessment in this case were properly deductible during 1923 to 1928 and the taxpayer rightfully deducted such charges in these years. The taxes on the property when purchased were at that time believed to be properly deductible by the taxpayer, since it was not until 1933 that it was first held that the California real property taxes involved here were a lien against the property. *Anderson v. Commissioner,* 27 B. T. A. 980; *California Sanitary Co. v. Commissioner,* 32 B. T. A. 122. Even after 1933 the question whether or not such taxes could be deducted as "taxes paid" under Section 23(e) of the Code was not fully settled until 1942. *Magruder v. Supplee,* 316 U. S. 394.

From the express terms of the *but* clause of Section 113(b)(1)(A) and from its Congressional background, it is clear that Congress did not intend the taxpayer to achieve a double deduction or its equivalent where the taxpayer has deducted such items in prior years, whether or not such deduction was under an express right or under what was at the time of such deduction a generally-accepted color of right. The Supreme Court, the Courts of Appeals, and the Tax Court have, wherever possible sought to prevent taxpayers from obtaining double deductions or their equivalent for any given expenditure or charge. *Ilfeld v. Hernandez, supra; Central Real Estate Co. v. Commissioner,* 47 F. 2d 1036 (C. A. 5th); *Comar Oil Co. v. Helvering,* 107 F. 2d 709, 711 (C. A. 8th);

Reliable Incubator and Brooder Co. v. Commissioner, 6 T. C. 919, 929; see *Wheelock v. Commissioner,* 77 F. 2d 474, 477 (C. A. 5th).

In four of the above-cited cases, the taxpayers had in earlier years taken deductions which the Commissioner had allowed for the prior years and when the taxpayers sought to deduct the same items in subsequent years, the courts held that Congress did not intend taxpayers to obtain double deductions or their equivalent for the same charges. *Central Real Estate Co. v. Commissioner, supra; Comar Oil Co. v. Helvering, supra; Wheelock v. Commissioner, supra; Reliable Incubator & Brooder Co. v. Commissioner, supra.* Although the *Central Real Estate* and the *Wheelock* cases involved deductions which were rightfully claimed and allowed in the earlier years, the *Comar Oil* and the *Reliable Incubator* cases involved deductions which were erroneously claimed and allowed under color of right in the earlier years. In the *Comar Oil* case, the court pointed out (p. 711) that it mattered not whether the deduction and allowance had been "rightfully or erroneously" allowed, but that, since the taxpayer had voluntarily induced the Commissioner to allow the deduction in the earlier years, the taxpayer could not complain if a second deduction or its equivalent were disallowed in computing its tax for the later year in which such deduction should properly have been taken.

The taxpayer argued below and the District Court erroneously agreed that this case represents an attempt by the Commissioner of Internal Revenue "to collect those wrongly deducted items" of 1923-1928 as to which "the statute of limitations has long since run." Appendix, *infra.* The erroneous decision of the District Court from which this appeal has been taken was based upon this

misunderstanding of the taxpayer's claim.[3] This case involves an attempt *by the taxpayer* (not the Commissioner) to obtain the equivalent of a double deduction in 1944 and 1945 for taxes and other charges which the taxpayer voluntarily deducted from its taxable income and which the Commissioner allowed under color of right for the years 1923 through 1928. In this case, the taxpayer seeks to include such taxes and charges in the "adjusted basis" of the property under Section 113(b)(1)(A). Adjustments and deductions such as those allowed in Section 113(b)(1)(A) are clearly matters of legislative grace and the burden of proving the right to the second deduction or adjustment is upon the taxpayer. *United States v. Anderson,* 269 U. S. 422. This burden the taxpayer must sustain in the face of the express prohibition of the *but* clause of subsection (A) on the deduction claimed, a prohibition reinforced by the Regulations which provide that *"adjustments must always be made to eliminate double deductions or their equivalent."* (Italics supplied.) Regulations 111, Sec. 29.113 (b)(1)-1.

There is only one interpretation which can reasonably be placed on the *but* clause of Section 113(b)(1)(A) and that interpretation precludes the adjustment and relief claimed by the taxpayer in this action. The legislative background of the *but* clause shows that if such clause is not applied to this case, then the *but* clause has no meaning. From its very language, the *but* clause ap-

---

[3]Further error in the District Court's reasoning is the application of *Magruder v. Supplee,* 316 U. S. 394, to this case. In the first place, the *Supplee* opinion is inapplicable since the question there was whether certain taxes could be deducted from income as "taxes paid" under Section 23(e) of the Code, whereas here the taxes have already been deducted and allowed by the Commissioner and the question of the deductibility is moot. Secondly, in this case there are other charges in addition to taxes, and as to these other charges the taxpayer clearly exercised a proper election to deduct them in the years 1923 through 1928.

plies to all "taxes or other carrying charges for which deductions have been taken by the taxpayer in determining net income for * * * prior taxable years." Sec. 113(b)(1)(A). The *but* clause applies to *all* deductions which *"have been taken"* (italics supplied) whether rightfully or erroneously taken. In this case, all the deductions other than the taxes were rightfully taken by the taxpayer during 1923 through 1928 and the taxes were voluntarily deducted by the taxpayer and allowed by the Commissioner under color of right and under what was then generally-accepted law. To allow the taxpayer's claim in this case would impute to the *but* clause of Section 113(b)(1)(A) an intent on the part of Congress to allow an adjustment representing the equivalent of a double deduction, which the very language of the *but* clause, the Regulations thereunder, and the legislative history of the clause expressly deny.

Conclusion.

The judgment of the District Court is erroneous and should be reversed.

Respectfully submitted,

H. Brian Holland,
Assistant Attorney General,
Ellis N. Slack,
A. F. Prescott,
Harvey M. Spear,
Special Assistants to the Attorney General.

Walter S. Binns,
United States Attorney.
E. H. Mitchell,
Edward R. McHale,
Assistant United States Attorneys.
June 1, 1953.

APPENDIX.

(The following Minutes of the District Court dated August 15, 1952, were on May 13, 1953, entered by the court as part of the record, *nunc pro tunc,* and were on May 25, 1953, certified to this Court as part of the record on appeal.)

[Title of District Court and Cause.]

MINUTES OF THE COURT—AUGUST 15, 1952.

Present: The Honorable *Peirson M. Hall,* District Judge;

Deputy Clerk: Francis E. Cross.

Proceedings: Filed Stipulation of Facts.

Ruling:

The copies of briefs filed have been helpful, but the questions appear to me to be simple;

Both the taxpayer and the Commissioner of Internal Revenue, clearly made a mistake of law when the deductions were made and allowed after audit by the Internal Revenue Bureau, for the years 1923-1928. *Magruder v. Supplee* (1942), 316 U. S. 394. It is equally clear that the statute of limitations has long since run against the Commissioner of Internal Revenue to attempt to collect those wrongly deducted items. And Sections 3770 (a)(2) and 3775(a) are also clear in precluding any attempt by the Commissioner of Internal Revenue to collect those wrongfully deducted items after the statute of limitations has run. Judgment will, therefore, be for the plaintiff, who will prepare Findings and Judgment under the rules.

EDMUND L. SMITH,
Clerk,
By FRANCIS E. CROSS,
Deputy Clerk.

No. 13734

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

THE ALBERTSON COMPANY, a corporation,

Appellee.

On Appeal From the United States District Court for the Southern District of California, Central Division.

BRIEF FOR THE ALBERTSON COMPANY, APPELLEE.

DANA LATHAM,
AUSTIN H. PECK, JR.,
830 Statler Center,
900 Wilshire Boulevard,
Los Angeles 17, California,
Attorneys for Appellee.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

No. 13734

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

THE ALBERTSON COMPANY, a corporation,

Appellee.

On Appeal From the United States District Court for the Southern District of California, Central Division.

BRIEF FOR THE ALBERTSON COMPANY, APPELLEE.

Jurisdiction.

This appeal involves federal income and personal holding company taxes for the years 1944 and 1945. The taxes in dispute were paid on or about September 16, 1947. Claims for refund were filed on or about September 6, 1949, and were rejected by notice dated July 10, 1950. Within the time provided in section 3772 of the Internal Revenue Code and on July 25, 1950, the taxpayer brought an action in the District Court for recovery of the taxes paid. [R. 41-42.] Jurisdiction was conferred on the District Court by 28 U. S. C., section 1346. The

judgment was entered on October 8, 1952. [R. 58-59.] Within sixty days and on December 5, 1952, a notice of appeal was filed. [R. 60.] Jurisdiction is conferred on this Court by 28 U. S. C., section 1291.

Opinion Below.

The District Court wrote no formal opinion in this case.

Question Presented.

Whether, in determining gain or loss under section 111 of the Internal Revenue Code on the sale of certain real property in 1944 and 1945, The Albertson Company, hereinafter referred to as the taxpayer, may include in the cost, or unadjusted basis, of such property within the meaning of section 113(a) certain taxes (then a lien on such property) and other charges, which were paid by the taxpayer when it purchased the property in 1923 through 1928, and for which the taxpayer took deductions on its tax returns which were allowed by the Commissioner in determining the taxpayer's taxable net income for such prior years.

Summary of the Facts.

The facts in this case were stipulated. [R. 31-42.]

The taxpayer is a corporation organized under the laws of the State of California and maintaining its principal place of business in Los Angeles. During 1923, 1924, 1926, 1927 and 1928, the taxpayer purchased, or otherwise acquired, certain real property in Los Angeles and in Beverly Hills, California. At the time of acquisition, each of the properties was subject to a lien for real property taxes. In acquiring the property the taxpayer in-

curred additional costs in connection therewith such as escrow fees, deed recording fees, lighting assessments, commissions, title policy fees, and improvement assessments. The taxes and other charges were paid by the taxpayer at or after the respective dates of acquisition of the properties. [R. 31-36.]

In computing its federal income taxes for the years of acquisition, the taxpayer deducted the above-mentioned payments from its gross income and such deductions were allowed by the Commissioner of Internal Revenue with tax benefits resulting to the taxpayer. [R. 37.]

In 1944 and 1945, the taxpayer sold the real property purchased between 1923 and 1928. [R. 32-37.] In determining the "adjusted basis" of such property, the taxpayer included all of the above-mentioned taxes, escrow fees, deed recording fees, lighting assessments, commissions, title policy fees and improvement assessments in its cost (unadjusted basis) of such property. [R. 4.] Upon examination of the taxpayer's corporation income and personal holding company tax returns for 1944 and 1945, the Commissioner of Internal Revenue determined that the taxpayer could not include the above-mentioned items in its cost (unadjusted basis) of the property sold during 1944 and 1945, and assessed additional income taxes and personal holding company surtaxes against the taxpayer for such years in the total amount of $5,662.95, together with interest thereon. The taxpayer paid the asssessments, filed claims for refund and, upon the disallowance thereof, brought this action for their recovery. [R. 41-42.]

Summary of Argument.

Section 111(a) of the Internal Revenue Code requires that the gain or loss from the sale or other disposition of property be determined by reference to the adjusted basis of the property. Adjusted basis is defined by section 113(b) of the Internal Revenue Code. That section provides that adjusted basis shall be the basis determined under section 113(a) of the Internal Revenue Code, adjusted as provided in the subsections of section 113(b). Section 113(a) of the Internal Revenue Code provides that the basis of property shall, with certain exceptions not here in issue, be the cost of such property.

The pleadings allege and admit, and the stipulation of facts discloses, that the taxpayer included in the cost of the properties sold in 1944 and 1945 the taxes and other charges for which it had claimed deductions in the prior years of purchase and payment, and which deductions had been allowed by the Commissioner of Internal Revenue. Said taxes and other charges were a part of the cost, or unadjusted basis, of the properties. The deduction by taxpayer of said amounts, and the allowance thereof by the Commissioner of Internal Revenue, were the result of a mutual mistake of law. Said deductions were not adjustments to basis under section 113(b) of the Internal Revenue Code, or any subsection thereof.

ARGUMENT.

In the Determination of Gain or Loss on the Sale by Taxpayer of Real Property in 1944 and 1945 the Taxpayer was Entitled to Include and Must Include in the Cost or Unadjusted Basis Thereof Taxes and Other Amounts Which Were Paid by the Taxpayer When it Purchased the Several Properties in 1923 Through 1928, Notwithstanding the Fact That Deductions for Said Amounts Were Claimed and Allowed in Determining the Taxpayer's Net Income for Such Prior Years.

Section 111 of the Internal Revenue Code (see appendix of applicable statutory provisions at the conclusion of this brief) provides that the gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 113(b) for determining gain, and that the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.

Section 113 of the Internal Revenue Code is entitled "Adjusted Basis for Determining Gain or Loss." Section 113(a) provides that, with certain exceptions not in issue or in controversy in this case, the basis of property shall be the cost of such property. Section 113(b) then defines adjusted basis as being "the basis determined under subsection (a), adjusted as hereinafter provided."

Under these sections, the taxpayer, in determining the gain or loss from the sales in question, was first required to determine cost, or unadjusted basis, under section 113(a). The next step was to make any required adjust-

ments to that cost, or unadjusted basis. Once any such required adjustments were made, the gain or loss was mathematically determinable by reference to the sale price.

Paragraph III of the taxpayer's complaint [R. 4] alleges in part that

> "In computing the adjusted basis for determining gain or loss from the sales of these properties the plaintiff included *as a part of the cost of said properties,* taxes paid by the plaintiff which were a lien on said properties at the time they were acquired and escrow fees, recording costs and other related expenses paid by the plaintiff as set forth fully in the plaintiff's claims for refund * * *." (Emphasis added.)

Paragraph III of the appellant's answer [R. 28]:

> "Admits the allegations contained in Paragraph III [of the complaint], except that each and every allegation contained in the plaintiff's claims for refund attached to the complaint of the plaintiff, as Exhibits 'A,' 'B,' and 'C,' is specifically denied except those that are admitted in this answer."

In Paragraphs IV, VI, VIII, X, XII, and XIII of the stipulation of facts [R. 32-37] it is stipulated that in computing the gain or loss from the sales therein described, the taxpayer included said taxes and other charges in the *unadjusted* basis of said properties. Thus the pleadings and the stipulation of facts clearly state that the taxes and other charges giving rise to the present controversy were included in the *cost,* or unadjusted basis, of the properties under section 113(a) of the Internal Revenue Code.

The appellant's fundamental error, which error pervades its argument and renders its position without merit, is

in its contention that the taxes and other charges were adjustments to basis under section 113(b)(1)(A) of the Internal Revenue Code. The appellant's argument is that the "but" clause of section 113(b)(1)(A) forbids the inclusion of the taxes and other charges in the "adjusted basis." This constitutes a misconception of the issue. Since the pleadings and stipulated facts clearly and definitely establish that the taxes and other charges in question were included in *cost* under section 113(a), and were not *adjustments to cost* under section 113(b), the entire argument of the appellant is misdirected and fails to meet the issue. In short, the appellant has presented no argument to this Court on the real issue. It would seem that its appeal must fail for that reason alone.

The situation presented in this case is, simply stated, this: In the years 1923 through 1928, the taxpayer purchased, or otherwise acquired, parcels of real property which, at the time of acquisition, were subject to tax liens. In addition, it paid escrow fees, title policy fees, and other obligations connected with the acquisition of said properties. The taxes were, in accordance with general practice, prorated to the date of closing of the escrows, so that the economic burden thereof fell upon the vendors up to the date of closing of escrow and upon the taxpayer from that time forward. The taxpayer deducted the portion of the taxes which it so paid, as well as the escrow fees, title fees, and other charges. The fact of the taking of these deductions was not withheld from the Commissioner of Internal Revenue, but, on the contrary, was well known to him and was accepted by him. [R. 38-40.] This, presumably, was in accordance with then accepted practice, notwithstanding that under the law, as subsequently interpreted by the United States Supreme Court, the taxes

and other charges in question were not deductible items. In the taxable years here in question, 1944 and 1945, the properties referred to were sold. In determining its gains and losses, the taxpayer included the taxes and other charges above referred to in the cost or unadjusted basis. The Commissioner of Internal Revenue contests the taxpayer's right so to include said taxes and other charges.

It is well settled law that the payment by a purchaser of taxes which are a lien on property at the time of the purchase is a capital expenditure, not deductible by him, and that such payment is a part of the cost or purchase price of the property. This principle would seem to have been settled beyond any question by the decision of the United States Supreme Court in *Magruder v. Supplee* (1942), 316 U. S. 394. In that case the facts were as follows: Supplee, the taxpayer, had purchased various parcels of real property in Baltimore, Maryland, in 1936 and 1937. State and city real property taxes for the years of the purchase constituted a lien on the properties at the time of the purchase, but had not become payable at that date. The purchase contract provided for apportionment of said taxes, the purchaser, Supplee, agreeing to pay the portion allocable to the period subsequent to his acquisition. Supplee deducted in his 1936 and 1937 income tax returns the taxes allocable to the period following the purchase. Said deduction was claimed under section 23(c) of the Revenue Act of 1936, which allowed a deduction for "taxes paid or accrued within the taxable year."

The Commissioner of Internal Revenue ruled that said amounts were not deductible by Supplee. The United

States District Court held that the amounts were deductible, and on appeal by the Commissioner, the United States Court of Appeals for the Fourth Circuit affirmed. The Supreme Court granted certiorari, and reversed the Court of Appeals. It held, with the Commissioner, that the amounts in question were not properly deductible by Supplee. The Court said in part (316 U. S. 399):

> "Thus either a pre-existing tax lien or personal liability for the taxes on the part of a vendor is sufficient to foreclose a subsequent purchaser, who pays the amount necessary to discharge the tax liability, from deducting such payment as a 'tax paid.' Where both lien and personal liability coincide, as here, there can be no other conclusion than that the taxes were imposed on the vendors. Respondents simply paid their vendors' taxes; they cannot deduct the amounts or any portion thereof, paid to discharge liabilities so firmly fixed against their predecessors in title by the laws of Maryland."

In its opinion, the Court quoted, with approval, the following statement of Judge Parker, dissenting in *Commissioner v. Rust's Estate* (C. A. 4, 1940), 116 F. 2d 636, 641:

> "Payment by a subsequent purchaser is not the discharge of a burden which the law has placed upon him, *but is actually as well as theoretically a payment of purchase price;* for, after the lien attaches and the taxing authority becomes *pro tanto* an owner of an interest in the property, payment of the tax by a purchaser is nothing but a part of the payment for unencumbered title." (Emphasis added.)

It is true that the *Supplee* case involved a question of deductibility by the purchaser of the amounts paid on

account of the vendor's tax liability. Nevertheless, the reasoning in the case, and the basis for the decision, were that the amounts paid by the purchaser constitute part of the purchase price.

If there were any doubt on that score, it is dispelled by *Crane v. Commissioner* (1947), 331 U. S. 1, and *Blackstone Theatre Co. v. Commissioner* (1949), 12 T. C. 801. In the former, the question was as to the basis of real property inherited by the taxpayer from her husband. For Federal estate tax purposes the property had been appraised in the husband's estate at an amount exactly equal to an encumbrance then on it. The taxpayer asserted that her basis was zero, therefore could not be depreciated, and that her basis when she later sold the property (her equity) was zero. However, the Commissioner argued, and the Court held, that the unadjusted basis under section 113(a)(5) of the Internal Revenue Code was the value at the date of the husband's death, without deduction of the amount of the encumbrance.

In the *Blackstone Theatre Co.* case, *supra,* the rules enunciated in *Magruder v. Supplee, supra,* and *Crane v. Commissioner, supra,* were applied under circumstances closely resembling those of the present case. There the taxpayer bought improved real property which was subject to tax liens in the sum of $120,950.03, representing unpaid real property taxes and penalties for prior years. In a subsequent year the taxpayer bid in, for approximately $50,000, the tax liens, and thereby eliminated them. The taxpayer also paid legal fees of $10,000 and $3,000 for title fees in connection with the matter. The question presented to the Tax Court was whether the full amount of the tax liens, or only the amount later

paid by the taxpayer to acquire them, should be included in the unadjusted basis of the property. In holding that the full amount of the tax liens should be so included, the Tax Court said (12 T. C. 804):

> "Whatever vitality respondent's present position, or a sterner one he asserts he may have taken, may have had before the Supreme Court spoke in *Crane v. Commissioner,* 331 U. S. 1, it can not now be said to have survived the broad sweep of that decision. From *Crane* we can deduce the following applicable principles: (a) The basis for given property includes liens thereon, even though not personally assumed by the taxpayer; and (b) the depreciation allowance should be computed on the full amount of this basis. These principles, we believe, are controlling in this proceeding, and should be dispositive of the one litigated issue presented."

Thus, the cited cases establish the rule on which the taxpayer here relies.

It will be noted also that the *Blackstone Theatre Co.* case recognizes that expenses (legal fees and title fees) incurred in the acquisition of property are part of the *cost* thereof. Therefore, the case is authority that the other amounts here involved (the commission paid on the exchange, the escrow fees, recording fees, the commissions paid to real estate agents and fees for drawing and recording deeds) were all capital expenditures in the acquisition of the properties. They were amounts paid for increasing the capital value of the properties, and were not deductible. Reg. 111, Sec. 29.24-2. Moreover, the improvement assessment [R. 48, 49] was part of the substituted basis of a property exchanged, and so was a part of the basis of the property sold by virtue of sec-

tion 113(a)(6) of the Internal Revenue Code. As such, it was a capital expenditure. *Champion Coated Paper Co.* (1928), 10 B. T. A. 433.

The appellant states (App. Br. 5) that "the charges other than taxes which the taxpayer deducted in the earlier years were rightfully deducted by the taxpayer, and the taxes were deducted by the taxpayer and allowed by the Commissioner under color of right and under what was then believed to be the applicable law." At no point in its brief does the appellant point out under what theory of law the charges, other than taxes, were rightfully deducted. The cases and regulations hereinabove referred to in connection with said charges establish clearly that the taxpayer made a mistake of law in deducting said charges. The Commissioner made a mistake of law in allowing them to be deducted.

Neither is there any support in the appellant's brief or elsewhere for the allegation that the taxes were deducted and allowed under color of right. It is true that both the taxpayer and the Commissioner were guilty of a mistake of law in the deduction and allowance of the tax payments; but the taxpayer had no right, colorable or otherwise, to deduct those payments, as the cited cases clearly show.

Elsewhere in its brief (App. Br. 13), appellant states that the taxpayer, in deducting the taxes and other charges from its income during the earlier years, was exercising what amounted to an election to make such deductions. If there were any such election available to a taxpayer, it would seem that the United States Supreme Court would have recognized it in the *Supplee* case, *supra,* where the right to the deduction was directly in issue. The

appellant throughout its brief has confused the issue. It fails to distinguish between those costs and charges as to which there is no election, and taxes *and other carrying charges,* liability for which is incurred *after* acquisition of the property, as to which a specific election to capitalize is afforded by section 24(a)(7) of the Internal Revenue Code.

An election is available where a taxpayer has a choice of two legal methods of computing his tax. Having elected one of the legal methods, he is not permitted to change his mind to the detriment of the revenue. *Ross v. Commissioner* (C. A. 1, 1948), 169 F. 2d 483. No election was available, under the facts of this case, to deduct expenditures which were capital expenditures. The deductions taken were purely the result of a mutual mistake of law on the part of the taxpayer and the Commissioner.

Taxes and other carrying charges which are contemplated by the "but" clause of section 113(b)(1)(A) (upon which appellant rests its argument) are necessarily the taxpayer's own taxes, because only his own taxes are a carrying charge and only his own taxes would be deductible if he elected not to capitalize them. The "but" clause exists only because, under section 24(a)(7) of the Internal Revenue Code and Reg. 111, section 29.24-5, some taxes and carrying charges may be capitalized at the taxpayer's election. In order that there be an election, however, the taxes or carrying charges must otherwise be properly deductible. The cited section of the regulations provides in part that:

> "In accordance with section 24(a)(7), items enumerated in section (b) of this section may be capital-

> ized at the election of the taxpayer. Thus, taxes and carrying charges with respect to property, of the type described in this section, are chargeable to capital account at the election of the taxpayer, *notwithstanding that they are expressly deductible under section 23.* No deduction is permitted for any items so treated." (Emphasis added.)

The regulation then goes on to describe the types of taxes and carrying charges which may be deducted and concludes in subparagraph (4) with the following:

> "Any other taxes and carrying charges with respect to property, *otherwise deductible,* which, in the opinion of the Commissioner are, under sound accounting principles, chargeable to capital account." (Emphasis added.)

But a vendor's taxes, when and if paid by the vendee, are not deductible by the vendee under section 23, because to him they are part of the payment for unencumbered title. *Magruder v. Supplee, supra.* All of the items in dispute here were obligations incurred by the taxpayer at the time of purchase pursuant to the contracts of purchase, so that by their very nature they are not carrying charges and the election referred to by appellant was not available.

Appellant argues that a statutory prohibition against double deductions exists by virtue of language contained in Reg. 111, section 29.113(b)(1)-1. Similar language has been contained in prior regulations, and, argues appellant, has received Congressional approval by virtue of re-enactments of section 113(b)(1)(A) of the Revenue Acts. (App. Br. 11, 12.) The regulatory language quoted by the appellant is in that portion of the

regulations dealing with general rules affecting adjusted basis. It has already been pointed out that this case does not present a question of adjustments to basis, but, rather, the determination of unadjusted basis under section 113(a) of the Internal Revenue Code.

Apparently the appellant would ask this Court to apply the general language of the regulation quoted at page 11 of its brief as an administrative nullification of the statute of limitations. In this appellant goes too far. Many decisions state the principle that the law does not contemplate the adjustment of an incorrectly computed tax by the incorrect computation of another tax. *Union Metal Manufacturing Co.* (1925), 1 B. T. A. 395; *Streckfuss Steamers, Inc.* (1952), 19 T. C. 1. Under our system of federal taxation, tax liability is determined on an annual or periodic basis. An error made in computation of tax for one year cannot be corrected by an erroneous computation in a later year. *John B. Hollister* (1941), 44 B. T. A. 851; *Estate of William Steele* (1936), 34 B. T. A. 173. The rule sometimes works against the Government and sometimes against the taxpayer. However, it is conducive to orderly administration of the tax laws and must be observed no matter who suffers from its application.

Congress has mitigated the effect of the statute of limitations in certain circumstances by the enactment of section 3801 of the Internal Revenue Code. That section permits adjustment of errors committed in earlier years, in spite of the statute of limitations, where, in specified situations, an item has been treated inconsistently. But by its own terms section 3801 preserves the bar of the statute of limitations as to all such inconsistencies which

occurred in taxable years prior to 1932. Here the original error occurred long prior to 1932. Moreover, the adjustment permitted by section 3801 is not effected by an incorrect computation of tax in the later year, but by opening the earlier, and otherwise barred, year to a correct computation of liability for said year.

In a further attempt to support its argument that the taxpayer is here seeking an improper double deduction, or its equivalent, the appellant cites four cases (App. Br. 13, 14), none of which is in point. In *Ilfeld Co. v. Hernandez* (1934), 292 U. S. 62, the taxpayer attempted to deduct, during a period in which it filed a consolidated return with other corporations, a loss alleged to have been sustained upon the dissolution of two subsidiaries which were members of the consolidated group. The Revenue Act of 1928, under which the case arose, authorized the Commissioner to prescribe regulations governing consolidated returns; and further provided that the filing of a consolidated return by an affiliated group constituted consent to such regulations. The regulations issued by the Commissioner under that authority expressly provided that gains or losses would not be recognized upon a distribution during a consolidated return period by one member of the consolidated group to another in cancellation or redemption of its stock. The case merely holds that the first deduction (operating losses sustained by the subsidiaries prior to the dissolution) was proper; the second deduction allegedly sustained upon dissolution of the subsidiaries, and attributable to the prior operating losses, was forbidden by duly authorized regulations covering consolidated returns, to which regulations the taxpayer had expressly consented.

Central Real Estate Company v. Commissioner (C. A. 5, 1931), 47 F. 2d 1036, presented a case in which the taxpayer had, in years subsequent to the acquisition of property, deducted taxes and other carrying charges in computing its taxable net income for such years. As the appellant admits (App. Br. 14), said deductions were rightfully claimed and allowed in the earlier years. When the property was sold by the taxpayer in a later year, the previously deducted taxes and other carrying charges were included in the adjusted basis, the taxpayer relying upon a provision of the then existing regulations of the Commissioner (Reg. 69, Art. 1561) that such expenditures must be capitalized. The Court of Appeals for the Fifth Circuit ruled that said regulation was invalid insofar as it required or permitted capitalization of taxes or other carrying charges which had been properly deducted from income in prior years. In the present case, as has been pointed out, the deductions in the prior years were improperly claimed; and they were not taxes or other carrying charges.

Comar Oil Co. v. Helvering (C. A. 8, 1939), 107 F. 2d 709, involved a deduction in an earlier year pursuant to a method of inventory valuation claimed by the taxpayer and allowed by the Commissioner. The Court refused to allow the taxpayer to take an identical deduction in a subsequent year, and held the taxpayer to a consistent use of the chosen method. The Court relied upon the doctrine of estoppel, saying:

> "It [the taxpayer] is not entitled to a second deduction for the same identical loss, even though the loss was not realized in the year the deduction was

granted, because it not only approved the premature allowance of the deduction, but it claimed it and induced the Commissioner to grant it."

Reliable Incubator & Brooder Co. v. Commissioner (1946), 6 T. C. 919, was likewise decided against the taxpayer upon equitable principles. In that case, the taxpayer sought the deduction, in the taxable year, of the same items which it had deducted, and had induced the Commissioner to allow, in earlier years.

There is another reason why the appellant's argument concerning double deductions must fail. The reason is that this is not a case involving double deductions. Only one deduction was claimed here, albeit improperly—the deduction in the years of acquisition of the properties. In 1944 and 1945, the years of sale, no *deduction* of the taxes and other capital expenditures was claimed. The taxpayer merely included in its cost, or unadjusted basis, the full amount which it had originally expended in the acquisition of title. In so doing the taxpayer was not claiming a deduction under section 23 of the Internal Revenue Code. It was computing its cost under section 113(a), so that the amount of gain or loss could be determined as required by law.

In this aspect the case is similar to *Salvage v. Commissioner* (C. A. 2, 1935), 76 F. 2d 112. In that case Salvage had purchased shares of a corporation at a cash price substantially less than their then fair market value. Concurrently he executed an agreement never to enter into a business in competition with that of the corporation. However, he did not report any income from the favorable purchase. On a sale of the shares in a later year he claimed as his cost the fair market value of the shares

when he had received them, notwithstanding his failure to report any income at the time of acquisition. The Commissioner objected, claiming estoppel. The Court of Appeals rejected the Commissioner's argument, saying (p. 114):

> "So far as appears the petitioner's failure to report the income in 1922 was due to an innocent mistake of law; he made no false representation of fact, and may, for all that this record discloses, have mentioned the purchase in his 1922 return. Under such circumstance we cannot find any adequate basis for an estoppel. . . . Hence the fact that neither the petitioner nor The Viscose Company reported the sale of stock at less than its value as constituting income to the petitioner in 1922 is not material to the present issue, even though it may now be too late for the government to assess an income tax for that year."

The Supreme Court affirmed the decision of the Court of Appeals. *Helvering v. Salvage* (1936), 297 U. S. 106. The analogy between the cited decision and the present case is obvious, for although the *Salvage* case involved an improper *exclusion* from income, rather than an improper deduction, in the earlier year, the determination of cost for purposes of the later sale had to be made upon application of correct legal principles.

Appellant does not contend that the taxpayer in the present case is estopped, or otherwise equitably precluded, from doing as it did. Appellant's argument rests entirely upon a misconception of the legal principle expressed in section 113(b)(1)(A). The consequence of appellant's argument would be to permit it to keep the taxpayer's overpayments for 1944 and 1945, totalling in excess of

$4,000.00, exclusive of interest, to cover the taxes for the years 1923 through 1928 amounting to approximately $1,000.00 which it lost as a result of its own mistake of law. In so attempting, the appellant seeks to brush aside the bar of the statute of limitations in a case in which it was not misled, but rather misunderstood and misapplied the law.

Conclusion.

The judgment of the District Court was correct and should be affirmed.

Respectfully submitted,

DANA LATHAM,
AUSTIN H. PECK, JR.,
Attorneys for Appellee.

Dated: June 24, 1953.

APPENDIX.

Applicable Statutory Provisions.

Internal Revenue Code:

Section 111(a):

"COMPUTATION OF GAIN OR LOSS.—The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 113(b) for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized."

Section 113(a):

"BASIS (UNADJUSTED) OF PROPERTY.—The basis of property shall be the cost of such property; * * *."

Section 113(b):

"ADJUSTED BASIS.—The adjusted basis for determining the gain or loss from the sale or other disposition of property, whenever acquired, shall be the basis determined under subsection (a), adjusted as hereinafter provided."

Section 113(b)(1):

"GENERAL RULE.—Proper adjustment in respect of the property shall in all cases be made—

(A) For expenditures, receipts, losses, or other items, properly chargeable to capital account, but no such adjustment shall be made for taxes or other carrying charges, or for expenditures described in section 23(bb), for which deductions have been taken by the taxpayer in determining net income for the taxable year or prior taxable years;

* * * * * * * *"